Supreme Court of the United States

OCTOBER TERM, 1969

No. 927

JOHNNY WILLIAMS,

Petitioner,

vs.

FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

INDEX

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY,
STATE OF FLORIDA

FEBRUARY TERM, 1968

No. 68-1466

THE STATE OF FLORIDA

vs.

JOHNNY WILLIAMS

INFORMATION FOR ROBBERY—Filed March 20, 1968

IN THE NAME AND BY AUTHORITY OF THE STATE OF FLORIDA:

ALFONSO C. SEPE, Assistant State Attorney of the Eleventh Judicial Circuit of Florida, prosecuting for the State of Florida, in the County of Dade, under oath, information makes that JOHNNY WILLIAMS on the 6th day of March, 1968 in the County and State aforesaid, did unlawfully and feloniously make an assault upon MARIA SALAS and did by force, violence or putting in fear, rob, steal, take and carry away from the person or custody of the said MARIA SALAS, and against her will certain monies, goods or other property, to-wit:

Two (2) Rings,

said property being the subject of larceny and the property of MARIA SALAS, in violation of 813.011 Florida Statutes, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

/s/ Alfonso C. Sepe
Assistant State Attorney
Eleventh Judicial Circuit of Florida

REM/hht
3/15/68
Jail # 7137-68; Bkd: 3/11/68

STATE OF FLORIDA:
COUNTY OF DADE:

Personally appeared before me, ALFONSO C. SEPE, Assistant State Attorney of the Eleventh Judicial Circuit of Florida, who, being first duly sworn, says that the allegations set forth in the within Information are based upon facts that have been sworn to as true, and which facts, if true, would constitute the offense therein charged.

Subscribed in Good Faith

/s/ Alfonso C. Sepe
Assistant State Attorney
Eleventh Judicial Circuit of Florida

Sworn to and subscribed before me this 15th day of March, 1968.

/s/ J. F. MCCRACKEN
Clerk
Criminal Court of Record,
Dade County, Florida

By /s/ [Illegible], D.C.

[SEAL: Criminal Court of Record]

WITNESSES FOR THE STATE

1. A. W. Mitchell, MPD

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

No. 68-1466

STATE OF FLORIDA

—*vs*—

JOHNNY WILLIAMS

MISCELLANEOUS DEFENSE MOTIONS—Filed July 3, 1968

MOTION TO IMPANEL TWELVE MAN JURY

The Defendant moves the court to impanel a twelve man jury in this cause.

MOTION FOR DISCOVERY

The Defendant moves that the State furnish him with the names and addresses of the witnesses on whose evidence the Information is based.

The Defendant further moves for an order requiring the State to produce and permit the Defendant to inspect, copy or photograph any tangible evidence to be introduced, or otherwise material to the trial in this cause.

The Defendant further moves for an order requiring the State to allow the Defendant to inspect and copy any written or recorded statements or confessions of the Defendant, or of any witnesses who may testify in this cause.

MOTION FOR BILL OF PARTICULARS

The Defendant moves that the State furnish him with the exact location and the exact or approximate time that the crime for which he is being charged was committed.

A copy of this pleading was mailed to the State Attorney this 1 day of July, 1968.

/s/ Richard Kanner
Attorney for Defendant
1150 N. W. 14th Street
Miami, Florida 377-9711

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

DIVISION "D"

68-1466

ROBBERY

STATE OF FLORIDA

vs.

JOHNNY WILLIAMS

MINUTE BOOK ENTRIES—August 1, 1968

Denis A. Dean, Assistant State Attorney.

Richard Kanner, Counsel for the Defendant.

Reported by: Sylvia Burrow.

Richard Kanner, Counsel for the Defendant, Johnny Williams, presented a Motion to Impanel Twelve Man Jury, which motion the Court denied.

Counsel for the Defendant presented a Motion for Discovery, which motion the Court granted in part and denied in part.

Counsel for the Defendant presented a Motion for Bill of Particulars, which motion the Court granted.

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

No. 68-1466

STATE OF FLORIDA

—*vs*—

JOHNNY WILLIAMS

MOTION FOR A PROTECTIVE ORDER—Filed August 12, 1968

The Defendant would show unto this court that the State has demanded, pursuant to Rule 1.200 of the Florida Rules of Criminal Procedure, that the Defendant serve upon the prosecuting attorney a notice in writing of the Defendant's intention to claim an alibi; that the Defendant does in fact intend to produce an alibi witness or witnesses, and that the disclosure sought by the State Attorney at this time is in violation of the rights guaranteed to the Defendant under the Constitution of the State of Florida and the United States of America, in that

1. The notice of alibi rule is a rule of substantive law, and accordingly is not authorized by Article 5, Section 3 of the Florida Constitution, which limits the rule making power of the Florida Supreme Court to adopt rules of practice and procedure only, or elsewhere in the Florida Constitution or Florida Statutes.

2. The notice of alibi rule compels the Defendant in a criminal case to be a witness against himself in violation of the Florida Declaration of Rights, Section 12, and the 5th and 14th Amendment of the United States Constitution.

A copy of the above pleading was served on the State Attorney this 12 day of August, 1968.

/s/ Richard Kanner
Attorney for Defendant
609 Professional Arts Center
1150 N. W. 14th Street
Miami, Florida 377-9711

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

DIVISION "D"

68-1466

ROBBERY

STATE OF FLORIDA

vs.

JOHNNY WILLIAMS

MINUTE BOOK ENTRY—August 13, 1968

Denis A. Dean, Assistant State Attorney.

Richard Kanner, Special Public Defender, Counsel for the Defendant.

Reported by: Sylvia Burrow.

Richard Kanner, Special Public Defender, Counsel for the Defendant, Johnny Williams, presented a Motion for a Protective Order, which Motion the Court denied.

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

Cause Numbered 68-1466

STATE OF FLORIDA

vs

JOHNNY WILLIAMS, DEFENDANT

DEMAND FOR NOTICE OF INTENTION TO RELY UPON ALIBI—Filed August 13, 1968

RICHARD E. GERSTEIN, State Attorney of the Eleventh Judicial Circuit of Florida, herewith files its written demand for Notice Of Intention To Rely Upon Alibi by the defendant—in this cause; and, pursuant to Rule 1.200 of the Florida Rules of Criminal Procedure, the State alleges as specifically and particularly as is known to the prosecutor herein the place, date and time of the commission of the crime as follows: to-wit:

The alleged crime was committed at: 2841 Northwest 21st Avenue, Dade County, Florida, on or about 2:30 P.M. on the 6th day of March, 1968.

WHEREFORE, the State, having fully complied with the provisions of Rule 1.200, demands complete and continuing disclosure relating to this defense as by the said rule is prescribed and respectfully moves that the Court direct the defense to furnish said information not less than 30 days prior to date of trial.

RICHARD E. GERSTEIN
State Attorney
Eleventh Judicial Circuit of Florida

By /s/ Denis Dean
DENIS A. DEAN
Assistant State Attorney

[Certificate of Service (Omitted in Printing)]

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

Case Number 68-1466

STATE OF FLORIDA

—*vs*—

JOHNNY WILLIAMS, DEFENDANT

ANSWER TO DEFENSE MOTIONS—Filed August 13, 1968

COMES NOW RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit of Florida, by and through the undersigned Assistant State Attorney and files this the State's Answer to Defense Motions, as follows:

MOTION TO IMPANEL TWELVE MAN JURY

Denied.

MOTION FOR DISCOVERY

Tangible evidence may be viewed by contacting the State Attorney's Office.

There are no statements made by the defendant which have been reduced to writing.

MOTION FOR BILL OF PARTICULARS

The offense took place on March 6, 1968, at approximately 2:30 p.m., at 2841 Northwest 21st Avenue, Dade County, Florida.

RICHARD E. GERSTEIN
State Attorney

By: /s/ Denis A. Dean
Assistant State Attorney

[Certificate of Service (Omitted in Printing)]

[fol. 1]

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

No. 68-1466

STATE OF FLORIDA, PLAINTIFF

vs.

JOHNNY WILLIAMS, DEFENDANT

TRANSCRIPT OF TESTIMONY—August 15, 1968

The above-entitled case came on for trial before the Honorable Paul Baker, Judge of the above-styled court, and a jury, at the Metropolitan Dade County Justice Building, Miami, Florida, on the 15th day of August, 1968, commencing at 10:21 a.m.

APPEARANCES:

DENIS DEAN, Assistant State Attorney, Miami, Florida, on behalf of the State of Florida.

RICHARD KANNER, ESQ., Specially Appointed Public Defender, Miami, Florida, on behalf of the Defendant.

* * * *

[fol. 3] THE COURT: Bring Johnny Williams out, please.

Mr. Kanner, you do not have any motions or anything pending; do you?

MR. KANNER: For the record, I would just like to renew my motion to impanel a 12-man jury.

THE COURT: Denied. Have you given Mr. Kanner a copy of the venire?

MR. KANNER: Yes, Your Honor.

THE COURT: You may put the first six jurors in the box.

(Thereupon the prospective jurors were called, examined on their voir dire, and sworn to try the case.)

THE COURT: While the courtroom clears, court will be in recess for five minutes.

(Thereupon a short recess was taken, after which the following proceedings were had out of the hearing of the jury:)

MR. KANNER: Your Honor, if the Court please, I have had helping me on this case a recent graduate of the University of Florida who has not yet passed his [fol. 4] Bar, George Cardet, who is fluent in Spanish, and if the Court would have no objection, I would like for him to sit at counsel table with me.

THE COURT: I have no objection.

Before opening statement, would either side like the witnesses sworn?

MR. KANNER: Your Honor, I have no preference.

MR. DEAN: My witnesses were outside. Evidently, they have gone down for coffee.

THE COURT: If it is all right, I intend to have opening statements and break for an hour for lunch, and then come back and start the testimony. I would like to finish this today, if that is all right with you.

(Defendant enters courtroom.)

THE COURT: Are both sides ready?

MR. DEAN: Yes, Your Honor.

MR. KANNER: Yes, Your Honor.

THE COURT: Bring in the panel, please.

(Thereupon the jury returned to the courtroom.)

MR. DEAN: State concedes the presence of the jury, Your Honor, and waives polling.

MR. KANNER: Your Honor, I know of nothing in [fol. 5] the law or a custom that we have to do this every time. I would like to stipulate with Mr. Dean that we can forego this formality.

THE COURT: Is that all right with you?

MR. DEAN: Yes, Your Honor.

MR. KANNER: Thank you, Your Honor.

THE COURT: You may proceed.

MR. DEAN: Thank you, Your Honor.

May it please the Court, Mr. Kanner, gentlemen of the jury, this stage of the trial that we are beginning is referred to or commonly called the opening statement of counsel. I point out to you that nothing that I say to you now nor nothing that I say to you in this opening statement is to be considered by you as evidence.

As we have said previously, the evidence will be presented to you by the witnesses from the witness stand. But the opening statement is intended as sort of a capsule summary or an outline of the evidence, first from the State's side, as I feel it will be presented to you.

This document I hold in my hand is called the Information or is the charge that is pending against this de-
[fol. 6] fendant, and I would like to just take a moment and read it to you:

"In the Criminal Court of Record, in and for Dade County, State of Florida, February Term, 1968, The State of Florida vs. Johnny Williams, Information for Robbery.

"In the name and by authority of the State of Florida:

"Alfonso C. Sepe, Assistant State Attorney of the Eleventh Judicial Circuit of Florida, prosecuting for the State of Florida, in the County of Dade, under oath, Information makes that Johnny Williams on the 6th day of March, 1968, in the County and State aforesaid, did unlawfully and feloniously make an assault upon Maria Salas, and did by force, violence or putting in fear, rob, steal, take and carry away from the person or custody of said Maria Salas, and against her will, certain monies, goods or other property, to-wit: two rings, said property being the subject of larceny and the property of Maria Salas, in
[fol. 7] violation of 813.011 of the Florida Statutes, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida."

Signed: "Alfonso C. Sepe, Assistant State Attorney."

This Information is the vehicle by which the defendant is brought into count, and this is the reason we are here today.

In support of the allegations in the Information, I believe that the evidence will show that on March 6, 1968, which was a Wednesday, at approximately 2:30 in the afternoon, Mrs. Maria Salas was returning home from doing some shopping.

She lived at 29th Street and Northwest 21st Avenue here in Dade County, City of Miami.

She parked her car and she was unloading groceries, taking her parcels into the house. She was surprised by the defendant, Johnny Williams, who jumped out and pointed a gun at her. There were certain statements made by the defendant, Johnny Williams, and, as a result, the Defendant Williams took two rings: One was a [fol. 8] wedding band and the other ring will be described to you by Mrs. Salas.

The defendant took these rings and ran out of Mrs. Salas' house.

I believe the evidence will show that there was no one else there. At the time, her husband was working and her children were away.

Mrs. Salas then chased or followed the defendant out of the house for some distance, saw him running, went back and got into a car and followed him to his car, which was parked approximately one and a half to two blocks away. She saw him get into the car and drive off.

I believe the evidence will further show that a man was coming down the street at approximately this time, by the name of Mr. Fay (phonetic) F-a-y; that Mr. Fay saw Mrs. Salas, heard her screaming and yelling, pointing at the defendant, Johnny Williams, and Mr. Fay stopped his car, saw the defendant get into his car, which was a white Thunderbird, and that Mr. Fay took down the license number of that car and gave the license number to the City of Miami Police Officer when he arrived at the scene.

Shortly after that, Mr. Williams was arrested and charged with the robbery of Mrs. Salas.

[fol. 9] Briefly, that is what the evidence will show. The defendant is charged with robbery. Witnesses will testify, and at the end of all the evidence, I believe you will find that the State has met its burden and the defendant is guilty. Thank you.

THE COURT: Mr. Kanner.

MR. KANNER: May it please the Court, gentlemen of the jury, many times, defense counsel will waive opening argument with fear. I have got no such problems here.

One of the problems that Mr. Dean has got—and I would like to say something parenthetically—there is nothing that I'm going to say in this trial that I want this jury to think that I am trying to reflect on Mr. Dean, because nothing could be further from the truth. Mr. Dean does not investigate these cases. He has no interest in these cases other than as a prosecutor. He presents the best evidence that he has. Nothing that I ever say should be interpreted by this jury as reflecting on Mr. Dean.

One of the things that Mrs. Salas is going to testify to is that the defendant was—And this woman is going to positively identify Johnny Williams as the person that [fol. 10] was in her house. The reason I know this is she identified him at another trial, but she is also going to say that he was in her house for some seven to ten minutes, that he had no mask on, that he had no gloves on.

One of the things that I am interested in knowing from the State is where the fingerprints are, because there is not one single iota of fingerprints or other physical evidence that, I believe, is going to be introduced today that is going to be connected to Johnny Williams to connect him up with this crime, other than this eyewitness testimony.

Now, there is Mr. Pay—it is either Pay or Fay. I thought it was Pay—who got the license number of the car. I do not think there is any doubt but what this automobile was used in the perpetration of a robbery. Mr. Fay—or Pay, I believe it is—is going to testify that he came upon Mrs. Salas chasing in her automobile a person on the corner of 27th Street and 20th Avenue. That

he first noticed Mrs. Salas turn right from 19th Avenue down 27th Street, and she stopped and she spoke with three or four people in Spanish, apparently saying that this person, colored person, was the one who had robbed her. These people are not going to be here to testify, to [fol. 11] my knowledge.

Mr. Fay is not going to be able to identify this defendant. He is going to be able to say that this was a '60 white Ford Thunderbird, which was subsequently found, four or five days later, in Johnny Williams' house.

As I say, I do not think there is a great deal of question but what this Ford Thunderbird was used by whoever committed this crime, but when it comes down to the facts of the case as distinguished from the words, there is nothing, factually, there is no tangible, physical evidence to factually link Johnny Williams up at this time to the crime.

Now, it just so happened that Johnny Williams and his wife, during the time in question, were visiting a person who is going to be here to testify. It is during the time in question, and we have given this person's name to Mr. Dean and Mr. Dean has taken her deposition.

During the time in question, Johnny Williams and Johnny's wife and Mary Scotty—that is her name—were in Mary Scotty's apartment.

Now, it is unfortunate that he was not with a Priest or Rabbi, or probably unfortunate that he was not in [fol. 12] jail, but at the time of the robbery, he happened to be with Mary Scotty, and as a lawyer, I take my defense witnesses where I find them.

So, I would like to ask the jury to keep an open mind as the State presents its case. Judge Baker will probably instruct you later that you should not make any determination, Mr. Palmquist, and gentlemen of the jury, until the conclusion of the trial.

But basically, this is what my defense is, and I have got no qualms in advising the State at this time as to where is the fingerprint evidence? There are some other things that I may bring out later, but so far as physical, factual evidence to link Johnny Williams up with this crime, there is none that Mr. Dean has sug-

gested in his opening argument, and there is none that I am aware of that actually shows that Johnny Williams was, in fact, the perpetrator of this crime.

I appreciate your attention and I ask you to leave your minds completely open until the conclusion of the case. Thank you.

Thank you, Your Honor.

THE COURT: Gentlemen of the jury, the Court is [fol. 13] going to recess for lunch before entering upon consideration of the testimony.

The Court admonishes you at this time you will be kept together for lunch and go with the Bailiff and eat together and return to the courtroom. Do not discuss this case among yourselves nor permit anyone to discuss it with you.

You have only heard at this time the opening argument or statement of counsel, which is their opportunity to tell you what they believe the facts will show. Your minds are to be kept open until you have received all of the testimony, heard the argument of counsel, the charge of the Court, and had the opportunity to deliberate among yourselves.

Avoid being in any place where conversations between witnesses, attorneys, police officers are taking place about this case.

Your deliberations must be based entirely upon that evidence which is admitted by this Court in this courtroom.

With that admonition, I am going to excuse you at this time, remand you to the custody of the Bailiff.

It is now 20 minutes of 12:00. In order that we may [fol. 14] proceed as rapidly as possible, this trial will recommence at 12:45. I will ask that you return promptly at that time.

This Court stands in recess until 12:45.

(Thereupon the jury retired from the courtroom.)

(The trial reconvened at 1:04 p.m., pursuant to the taking of recess, and the following proceedings were had out of the hearing of the jury:)

THE COURT: Can we have all the witnesses, Mr. Dean?

MR. DEAN: Yes.

THE COURT: Mr. Kanner, if you have any witnesses—

MR. KANNER: Your Honor, my two witnesses are not here. They will be here.

THE COURT: All right.

MR. KANNER: Your Honor, if the Court please, with Mr. Dean's permission, I would like to respond to the notice for alibi witnesses, orally, into the record.

[fol. 15] THE COURT: I thought you said you had already done that.

MR. KANNER: Well, I have given the information to Mr. Dean, but he suggested we put it into the record.

THE COURT: All right. You can do that now, Mr. Kanner.

MR. KANNER: At the time that the defendant was supposedly committing this crime, he was at 1720 Northwest 52nd Street at the home of Miss Scotty, I believe it is.

MR. DEAN: Scotty.

THE COURT: You had this information prior to today?

MR. DEAN: Yes, Your Honor.

THE COURT: Would you swear the Interpreter first, please?

(Thereupon Fausto Ossorio was sworn to act as Interpreter during the taking of the testimony.)

THE COURT: Now, please administer the oath, through the Interpreter, to all witnesses.

Is there someone you want sworn in?

[fol. 16] (Thereupon the witnesses were sworn through the aid of the Interpreter.)

MR. DEAN: Your Honor, I have one further detective who is on call.

THE COURT: How many witnesses do you have?

MR. KANNER: Two witnesses, Your Honor.

I would like to invoke the Rule.

THE COURT: I am going to hold you, then, responsible for your two that are not here.

MR. KANNER: Yes, sir, Your Honor.

THE COURT: Mr. Ossorio, if you will please explain that the Rule has been requested, which means that all witnesses who are going to testify will have to remain outside of the courtroom. Do not discuss the case among yourselves or with anyone, other than counsel for the State or the defendant, and then not in the presence of any other witness.

Who do you wish first?

MR. DEAN: Mrs. Salas, Your Honor.

(Thereupon the witnesses retired from the courtroom.)

THE COURT: Bring in the panel, please.

[fol. 17] (Thereupon the jury returned to the courtroom.)

THE COURT: Polling has been waived. You may proceed.

MR. DEAN: Thank you, Your Honor. Thereupon—

MARIA SALAS,

was called as a witness on behalf of the State of Florida and, having been previously duly sworn, was examined and testified through the Interpreter as follows:

DIRECT EXAMINATION

BY MR. DEAN:

Q State your name and address, please.

MR. KANNER: If Your Honor please, at this time I would like to voir dire Mrs. Salas as to her fluency in the English language, and have some type of record to determine whether or not she is fluent and how fluent she is and how well she understands English.

MR. DEAN: I object, Your Honor. We are operating through an Interpreter.

MR. KANNER: Your Honor, I think I have the right [fol. 18] to determine, for my own satisfaction and the satisfaction of my clients, that this witness, who I am going to be forced to cross examine, is, in fact, illiterate in the English language.

MR. DEAN: Your Honor, to have an Interpreter, the witness does not have to be illiterate.

THE COURT: Let me just satisfy both sides and ask the witness myself: Mrs. Salas, do you understand what I am saying?

THE WITNESS: (Negative nod of head.)

THE COURT: Now I will let you try.

MR. KANNER: How long have you lived in this country? Mr. Interpreter, would you, please?

(Question propounded through Interpreter.)

THE WITNESS: It is going to be seven years.

(Thereupon the following questions were propounded and answers given through the Interpreter:)

MR. KANNER: What is your employment?

THE WITNESS: I am taking a beauty shop course.

MR. KANNER: Do you drive an automobile?

THE WITNESS: Yes.

[fol. 19] MR. KANNER: How long have you driven an automobile?

THE WITNESS: Since I was fourteen or fifteen years old.

MR. KANNER: Do you have a Florida driver's license?

THE WITNESS: Yes.

MR. KANNER: What type of examination did you take to receive this?

THE WITNESS: The same that everybody takes.

MR. KANNER: Was this a written examination?

THE WITNESS: Yes.

MR. KANNER: Was the examination written in English?

THE WITNESS: No; it was in Spanish.

MR. KANNER: What type of employment have you had prior to being a beauty shop—

MR. DEAN: I will object.

THE COURT: I am going to stop this. It is obvious she does not understand any of the questions you have asked her. She cannot reply in English, and if she does [fol. 20] not understand English, then she cannot intelligently answer questions. I do not see any point in going any further.

MR. KANNER: Okay.

THE COURT: Proceed, Mr. Dean.

MR. DEAN: Thank you, Your Honor.

BY MR. DEAN:

Q State your name and address, please.

A Maria Salas, 2841 Northwest 21st Avenue.

Q Were you living there on March 6, 1968?

A Yes.

Q On that date, did you have an occasion to see the defendant in this case, Johnny Williams?

A Yes.

Q Do you see him in the courtroom?

A Yes.

Q Would you point him out, please?

A (Pointing.)

MR. DEAN: Indicating the defendant, Johnny Williams.

BY MR. DEAN:

Q Approximately what time and where did you see him?

A At my home from 2:00 to 2:30 in the afternoon.

[fol. 21] Q Had you been somewhere prior to seeing him?

A Yes; I went to Food Fair.

Q Did you go to Food Fair alone?

A Yes.

Q When you came home, you were alone?

A Yes.

Q Tell us what happened when you went into your house.

A I came into my home with the packages of the groceries for the week. I had four packages.

I opened the door. I just put in the first package. I left the door open because I was coming in and out.

When I brought in the fourth package with a bottle of Clorox in my hand, I felt something dark, as if the door was being closed. I thought it was my neighbor next door.

MR. KANNER: Your Honor, I object to what the witness thought.

THE COURT: Sustained. Strike it.

BY MR. DEAN:

Q What happened next?

A I thought it was my neighbor next door.

[fol. 22] MR. KANNER: I would like the Court to instruct this witness to testify in response to Mr. Dean's questions rather than what her subjective ideas might have been.

THE COURT: Mr. Ossorio, tell her not to give us her opinion or what she thought, just what she saw and what she did.

Repeat the question, please.

BY MR. DEAN:

Q After you got inside your house with this bottle of Clorox, what happened?

A I felt the door as if it was getting closed. I was going to call my next door neighbor and I didn't have time because that man was there. Then I yelled for the next door neighbor. I said, "Estrella," and then he told me to shut up.

Q Who is "he"?

A (Indicating)

Q Indicating the defendant, Johnny Williams.

Where was he when you first saw him?

A By the door in the kitchen.

Q How far away from you was the defendant?

A As from here, where I am sitting now, to right [fol. 23] there (indicating).

Q Indicating approximately seven feet.

Was there anyone else at home at the time?

A No.

Q Did the defendant have anything in his hand?
A No.
Q Did he say anything to you?
A He told me to shut up. I kept on yelling and he told me again to shut up and for me to be quiet.
Q What did he do next, if anything?
A And I kept on yelling, and then when he saw—Then, he asked me where my husband was.
Q Did you give him an answer?
A I do not speak English but I understand a few words. I told him—I told him other house. I told him, "In the other house."
And then he told me, "No, he is working."
MR. KANNER: Your Honor, if the Court please, I hate to interrupt the direct examination, but it is apparent to me that the witness understands English when she wants to.
[fol. 24] MR. DEAN: Your Honor, I will object.
THE COURT: Sustained.
MR. DEAN: I move to strike the comment. It is not in the form of an objection.
MR. KANNER: It is in the form of an objection, Your Honor. I object to the use of an Interpreter.
THE COURT: Overruled.

BY MR. DEAN:

Q What did the defendant next say to you, if anything?
A I yelled out loud and he told me to shut up. And then he told me to go toward the bedroom.
I told him, I asked him, "Please. I have my child."
And he told me, "Okay," to be quiet.
When he noticed that I kept on yelling for my neighbor, then he pulled out a pistol that he had in his pocket. He had it inside a bag, a paper bag.
Q What kind of a pistol was it; if you know?
A I don't know anything about those things, but my [fol. 25] husband has a .45 and it was just like the one my husband has.
Q What did the defendant do with the gun, if anything?

A He pulled it out and he showed it to me and for me to be quiet and for me to go to the bedroom.

Q Did you go to the bedroom?

A No. I took off a ring I have that belong to my child and I gave it to him. He broke it and he said it was no good.

Then I gave him my wedding bands, my wedding rings.

He put them on his finger and he said it was okay, for me to go to the bedroom.

Q How many rings did the defendant take?

A Two: The wedding band and the solitaire.

Q After he put these on his finger, you said he told you to go to the bedroom?

A Yes. He told me that it was all right for me to give him that but for me to go to the bedroom.

Q Did you go to the bedroom?

A Then when he noticed that I wasn't going to the bedroom, I told him that, "Okay"—when he took the rings—that I was going there, but my kitchen has a [fol. 26] door. I took my wristwatch off and my bracelets. I took them in one hand. I opened the door. I told him, "Okay, okay."

Then I opened the other door. I threw all these pieces of jewelry on top of the table and he just make a gesture as if he was going to take them.

Q Was this still out in the kitchen area?

A Yes; in the kitchen.

Q After he reached for this jewelry, what happened?

A He make a gesture as if he was going to take them, and then I just went toward the garage.

MR. KANNER: Excuse me. I did not understand that.

Miss Reporter, would you read that back?

(The portion of the testimony referred to was read by the Reporter as above recorded.)

BY MR. DEAN:

Q After you went towards the garage, what did the defendant do?

A I don't know because I didn't look back. I was

waiting—I was waiting for a shot to sound or to be [fol. 27] fired.

Then, I opened the door that goes from the garage to the street and then I went to the street and I was yelling.

Q Were you walking or running?

A I was running plenty.

Q Did you see the defendant after that?

A Yes. I waited for him. I saw that he wasn't coming out. He stayed there for about two minutes inside the house.

Then I stood by the door of my home outside and I was waiting for him to come out.

Then I grabbed him here and I called my next door neighbor and I said, "Estrella, call the police."

MR. KANNER: Your Honor, I object as to what she told Estrella.

THE COURT: Overruled. It was in the presence of the defendant.

MR. KANNER: There is no showing that it was, Your Honor.

THE COURT: She said she had him by the collar.

BY MR. DEAN:

[fol. 28] Q When you made this statement to Estrella, was the defendant there?

A Yes.

Q Did the defendant say anything?

A No. He said "shut up." That is the only thing he said.

Q Did he still have the gun in his hand at this time?

A No, he didn't.

Q What happened next?

A Then he let me go. He pushed me and I just fall on him.

Then, when we were practically at the corner, I got hold of him again and I had to let him go.

Q Why did you let him go?

A Because he was stronger than I was.

Q What did you do next?

A Then, when I noticed that I couldn't just follow him—he was running all over the back yard there—I took

the keys that were in the keyhole of the door, because I didn't have time to get the keys out—

Q Was this the door of your house?

A Yes. Then I took the key and I went to my car. [fol. 29] I thought that with my car I would be able to catch him. Then I took the car and Mr. Soler took the driving wheel. Then both of us followed him but in the car.

Q Did you see the defendant again?

A I saw him passing by on the streets and through the back yards running.

Q What did he do when you saw him, after you saw him running through the back yards?

A We stay in the car trying to see if we could catch him. Then I was blowing the horn a lot and hoping that the police car would come by. Then a man that was on his way to school to pick up his children—

MR. KANNER: Your Honor, I object to anything that she says that might be based on hearsay. She would not have the least idea—

BY MR. DEAN:

Q Do not tell us what you think someone else was doing.

You saw another man; is that correct?

A Yes.

Q Did you see the defendant get into any car?

[fol. 30] A Yes.

Q Approximately how far away from your house was this car parked?

A About two blocks.

Q What did you see the defendant do, if anything, when he got to the car?

A He came in the car. He was bent over when he came into the car.

Q Did he remain in the car?

A No. He started and took off.

Q He left in the car?

A Yes.

MR. DEAN: Could I have this marked for identification, please.

THE CLERK: 1-A for Identification.

(Thereupon the photograph was marked as State's Exhibit 1-A for Identification.)

BY MR. DEAN:

Q I show you what has been marked as State's Exhibit 1-A for Identification and ask you if you can identify that (showing to witness)?

A Yes.

Q Where have you seen that car before?

[fol. 31] A I saw it one day driving by my home about a week or two before that happened, and then after, I follow him.

Q Was this the vehicle that the defendant got into that you just described?

A Yes.

Q Mrs. Salas, do you remember how the defendant, Johnny Williams, was dressed?

A He had on green pants and a pullover, kind of tight. It was green, also.

Q Was there anyone else in the car when the defendant got into it?

A There was a dog.

Q Had you seen the defendant, Johnny Williams, before this robery, before March 6th?

MR. KANNER: Your Honor, I object as to the relevancy.

MR. DEAN: For identification purposes, Your Honor.

THE COURT: If it is for that only, I will overrule the objection.

BY MR. DEAN:

Q Approximately when did you see him?

A I am not sure, but a week or two before that.

[fol. 32] Q Where did you see him?

A Passing by the very same door of my home.

Q Was he walking or was he in a car?

A No; he was in the car.

Q Was it the same car that you saw the day of the robbery?

A Yes.
Q Approximately how long was the defendant inside your house?
A It was a matter of about seven minutes.
Q All this took place in Dade County, Florida?
A Here in Florida.
Q Dade County, Florida?
A Yes.
MR. DEAN: Thank you. Your witness.
THE COURT: Cross examination.

CROSS EXAMINATION

BY MR. KANNER:

Q What color was the dog in Johnny's car?
A Well, I don't know. It was—he asked me what color it was? I know I saw a dog, but at this moment, [fol. 33] all I was trying to do was catch him. I didn't pay any attention to the dog. He was a big one.
Q How much did the dog weigh?
MR. DEAN: I will object, Your Honor.
THE COURT: Sustained.
MR. KANNER: I think it is very relevant, Your Honor.
THE COURT: I disagree with you. Sustained.

BY MR. KANNER:

Q What breed of dog was it?
A I don't know any of them.
Q Was it possible that the dog was white?
MR. DEAN: Object, Your Honor. Anything is possible.
THE COURT: Sustained.

BY MR. KANNER:

Q Was the dog in Johnny's car a week prior to the robbery?
A Yes.
Q Where was the dog in the car?
A In the back part.
Q On the day of the robbery, where was the dog?

[fol. 34] A In the rear seat of the car.

Q Have you seen this dog again?

A No. At the time he passed by my house.

Q I have some pictures which I would like for you to examine.

MR. DEAN: Your Honor, I will object until they are marked for identification purposes.

THE COURT: Sustained.

MR. DEAN: If you will have the Clerk mark them, I have no objection to her examining them.

MR. KANNER: Defendant's Composite Exhibit 1.

THE CLERK: A-1 for Identification.

(Thereupon the photographs were marked as Defendant's Exhibit A-1 for Identification.)

THE COURT: You may proceed.

BY MR. KANNER:

Q What color was the paper bag that Johnny had his gun in when he came in the house?

A It was the ordinary color, sort of cream.

Q How large was the paper bag?

A (Indicating) More or less that size.

[fol. 35] MR. KANNER: Let the record reflect that the witness is showing a bag approximately 14 inches high; is that correct, Mr. Dean?

MR. DEAN: Approximately.

BY MR. KANNER:

Q What did Johnny do with the paper bag after he took his gun out of it?

MR. DEAN: Objection, Your Honor. The witness did not testify that he got the gun from the bag.

THE COURT: Overruled.

MR. KANNER: Yes.

THE COURT: Go ahead. She can clarify it.

THE WITNESS: Well, he just pulled the gun out of the bag. I don't know what he did with it, with the bag.

BY MR. KANNER:

Q Did he put the bag in his pocket?

A I don't know, because after all this, I didn't know. I had to come here and I don't know.

Q You do not know. You do know that he took the gun out of the paper bag, though?

A Yes.

[fol. 36] Q Was Johnny wearing a mask?

A No.

Q Did he have gloves on?

A No.

Q How long was he inside your house?

A About seven minutes.

Q Now, Mrs. Salas, it is true, is it not, that I and my investigator, Mr. Cardet, went to your house on Thursday, August 8th and Tuesday, August 13th—

A Yes.

Q And I tried to talk to you about this incident?

A Yes.

Q And you refused to talk to me; is that true?

MR. DEAN: Objection, Your Honor.

THE COURT: Sustained.

MR. KANNER: Your Honor, I would like to excuse the jury and argue it.

THE COURT: You may. Take the jury out.

(Thereupon the jury retired from the courtroom.)

MR. KANNER: If Your Honor please, I think I have got the right to attempt to show into the record, [fol. 37] for the benefit of this jury, that defense counsel was there and attempted to talk with her, and for reasons best known to herself, she refused to talk to defense counsel.

I don't think this goes to her competency as a witness, but I think certainly, Your Honor, it goes to her credibility, and I think it is certainly something, Your Honor, that can be argued and should be argued.

I think I have a duty to argue this point to the jury.

The fact that I can subpoena her to take a deposition and she can talk to me whether she wants to or not is

no answer, Your Honor. I think it is important that, for reasons best known to her, and there may be very good reasons, that she refused, even though she has a perfect right to—and I will be the first to concede that she is under no legal obligation to discuss the case with defense counsel—but for reasons best known to the witness, she refused to talk to my investigator and I feel that I should be allowed to bring this out.

MR. DEAN: We object, first of all, that there is no [fol. 38] law, no rule of court, no decision requiring the witness to talk to defense counsel; and second of all, to go into what Mr. Kanner wants to go into is something that is in the witness' mind. This is clearly improper on cross examination of any witness.

THE COURT: Sustained. It is outside the scope of direct. It has got nothing to do with her credibility and she is—

MR. KANNER: Your Honor, while the jury is out, I would like to proffer this into the record.

THE COURT: All right.

MR. KANNER: It is true, is it not, that you refused to talk to Mr. Cardet and myself?

THE WITNESS: Yes.

MR. KANNER: It is true, is it not, also, that you refused to allow us inside the house to take photographs inside the house?

THE WITNESS: Yes.

MR. KANNER: Did Mr. Dean advise you not to talk to Mr. Cardet or myself?

THE WITNESS: No. We told him that Mr. Dean told us that if we wanted to, we could give them the information they wanted, and if we did not have to, we were not obligated.

MR. KANNER: Your Honor, I feel that this is very [fol. 39] important to allow the jury to hear.

THE COURT: It has no bearing on the issues, whether she talked to you or whether she didn't. If she did not, you had every right to bring her in and take her deposition.

MR. KANNER: I appreciate that, Your Honor.

THE COURT: Bring the jury in.

(Thereupon the jury returned to the courtroom.)

THE COURT: Proceed.

BY MR. KANNER:

Q Do you know what a lineup is? All it requires is a yes or no answer.

A Yes. I never saw one but—

MR. KANNER: Miss Reporter, would you read that back?

(The answer referred to was read by the Reporter as above recorded.)

BY MR. KANNER:

Q Did you see the defendant in a lineup?

A No.

Q It is true, is it not, that you testified against the [fol. 40] defendant in another case on May 22nd of this year; is that not correct?

A If I testify against him?

Q On May 22nd.

A Yes; against him, yes.

Q Except for this time on May 22nd, have you seen the defendant between March 6th, the time of the robbery, and today?

A No; I did not see him.

MR. KANNER: Excuse me. Mr. Interpreter, she answered the question.

THE COURT: Tell her not to volunteer anything.

BY MR. KANNER:

Q Were you shown some pictures on the date of the robbery?

A Yes.

Q By who?

A The police.

Q What time?

A At night.

Q Were you shown some pictures subsequent to this Wednesday?

A After the day of the robbery, they came back about three days after.

[fol. 41] Q Was this on a Friday that they came back?

A I am not sure about dates.

Q Did you report the robbery to the police on Wednesday?

A The very same day.

Q Did the police come out to speak with you on that date?

A Right away.

Q Did you give the police the license number of Johnny's car?

A Well, no. It was given by Mr.—I don't know his name.

Q Were you present when the automobile license tag number was given to the police?

A No.

Q Did the police come to your house to show you pictures on Wednesday?

A Yes. They came that very same day, and then afterwards two or three days.

Q Did they come to your house a second time?

A Yes.

Q How many pictures did the policeman bring with him? This is the first time.

[fol. 42] A Several.

Q Is several more than five?

A Yes.

Q Is several more than ten?

A Yes.

Q Is several more than twenty?

A Well, somewhere around there or more.

Q To the best of your recollection, Mrs. Salas, how many pictures did they bring the first time?

A (Indicating) The only thing I can say, that they brought many pictures, like this.

MR. KANNER: Miss Reporter, would you please read back the question.

(The question referred to was read by the Reporter as above recorded.)

THE WITNESS: The first time, they brought several, and the second time, they brought several, but I don't know how many exactly because I did not count them.

BY MR. KANNER:

Q Did they bring more pictures the second time?
A Yes.
[fol. 43] Q How many policemen brought the pictures the first time?
A Two.
Q How many policemen brought pictures the second time?
A There came one in a patrol car and then there came another patrol car.
Q How many policemen, all together, came the second time?
A The second time, two, only two.
Q Who else, besides yourself, viewed the pictures the first time?
A My husband—
MR. KANNER: Your Honor, I would appreciate it if the Court would instruct her again to respond to the questions.
THE COURT: You did not let her answer.
MR. DEAN: That is right.
THE WITNESS: My husband and Mr. Solis.
THE INTERPRETER: That was all she said.
THE COURT: She never got to answer the question. Now she has answered. Proceed.

BY MR. KANNER:

Q Did two people besides yourself examine the pic-
[fol. 44] tures the first time?
A The second time it was when I recognized him.
MR. KANNER: Excuse me, Mr. Interpreter. Would you read the question back, Miss Reporter?
MR. DEAN: Your Honor, can we have a full answer before Mr. Kanner makes an objection?
THE COURT: Sustained.

MR. KANNER: Your Honor, if the Court please, I asked specifically about the first time.

THE COURT: Just repeat the question. Do not ask the reporter to read it back every time. Rephrase it. Go ahead.

MR. KANNER: Miss Reporter, I forgot, frankly, what I asked her.

THE COURT: The question was: "How many people viewed the pictures the first time?"

THE WITNESS: I really don't understand. The first time when the patrol came over or the second time when I recognized him?

MR. KANNER: Mr. Interpreter, I did not hear your response.

(The answer referred to was read by the Reporter as above recorded.)

[fol. 45] BY MR. KANNER:

Q The first time.
A The same people that saw it the first time.
Q How many?
A Mr. Solis, myself, his wife.
Q How many, Mrs. Salas? How many?
A Four.
Q How many viewed the pictures the second time?
A Four.
Q Which of the defendant's features, Mrs. Salas, allowed you to identify him from his picture the second time?

MR. DEAN: I will object, Your Honor, to the form of that question. There has been no testimony that there was any one specific feature.

MR. KANNER: Let's find out, Your Honor.

THE COURT: Sustained as to the form of the question. Rephrase it.

BY MR. KANNER:

Q Mrs. Salas, the first time you saw the pictures, were there face pictures or were there face and full body profile pictures?

[fol. 46] A Only face.

Q The second time that you were shown pictures, were there face pictures or face and profile pictures?

A The front and profile.

Q Was it a profile picture that you initially identified the defendant with?

A There were two together: One front and the other one is profile.

Q Which of the pictures, the profile or the face, were you able to initially recognize the defendant?

A The face.

Q Was it the defendant's eyes that you were able to identify him with in the picture?

MR. DEAN: Object, Your Honor. She said his face.

THE COURT: Sustained.

MR. KANNER: Your Honor, I have a right to ask which of the features of the defendant, in his face, she was able to identify.

THE COURT: It may have been all of them. You can ask the question direct, but do not limit it. It is [fol. 47] suggestive of an answer. Rephrase it.

BY MR. KANNER:

Q What features in the defendant's face and head were you able to identify?

A All of it.

Q Were you able to identify his nose?

MR. DEAN: Objection, Your Honor.

THE COURT: Sustained.

BY MR. KANNER:

Q What were the names of the policemen who came by your house the second time?

A I don't know.

Q What did they tell you when they showed you the pictures, if anything?

MR. DEAN: Objection, Your Honor. That is hearsay.

MR. KANNER: It is certainly not hearsay.

THE COURT: It certainly is.

MR. KANNER: Hearsay as to what?

MR. DEAN: Your Honor, if we are going to have argument, can we have the jury taken out?

THE COURT: Let's not argue in front of the jury. [fol. 48] I sustained the objection. You can ask her if they told her anything. She can give a yes or no answer. Then, if it is something that has got to do with identification, you may voir dire out of the presence of the jury.

MR. KANNER: Your Honor, let's excuse the jury, then.

THE COURT: Ask the question first. If they did not say anything to her, there is no point in excusing the jury.

BY MR. KANNER:

Q I believe my question was: What, if anything, did they say to you?

MR. DEAN: Object to that question, Your Honor.

THE COURT: Sustained as to the form of it. Ask her if they said anything to her and she can give you a yes or no answer.

BY MR. KANNER:

Q Did the two policemen identify themselves to you as City of Miami Policemen?

MR. DEAN: Objection, Your Honor, hearsay again.

THE COURT: Overruled.

[fol. 49] THE WITNESS: Yes.

BY MR. KANNER:

Q Were they in uniform?

A Yes.

Q Did they tell you why they were there?

A Yes.

Q Were they there together?

A Them?

Q Were the two policemen at your home together the second time?

A Yes.

Q Did they say anything to you about the photographs that they had?

A Yes.

MR. KANNER: I would like to excuse the jury, Your Honor.

THE COURT: Take them out.

(Thereupon the jury retired from the courtroom.)

MR. KANNER: Did either of the policemen speak Spanish?

THE WITNESS: No.

MR. KANNER: What reason did they give to you for being there?

[fol. 50] THE WITNESS: Mr. Solis was the one who talked to them. They came there and they knocked.

MR. KANNER: Was it your husband who talked to them?

THE WITNESS: My husband was the one who opened the door.

MR. KANNER: Did your husband act as an interpreter?

THE WITNESS: No. He speaks very little English. He have to call Mr. Solis.

MR. KANNER: How do you spell your name?

THE WITNESS: Mine? S-a-l-a-s.

MR. KANNER: Off the record. Her name is S-a-l-a-s and his name is—

MR. DEAN: Nothing off the record, Your Honor.

THE COURT: Sustained.

MR. KANNER: S-a-l-o-s?

THE INTERPRETER: S-a-l-a-s.

THE COURT: That is her name.

MR. KANNER: And the neighbor?

THE WITNESS: S-o-l-i-s.

MR. KANNER: Did Mr. Solis act as an interpreter?

[fol. 51] THE WITNESS: Yes.

MR. KANNER: What did the policemen say to you about the pictures that they had?

THE WITNESS: That they were bringing those pictures to see if among them there were—that man was there.

MR. KANNER: Did they tell you that they thought the defendant was there?

THE WITNESS: No.

MR. KANNER: Did they show you any particular picture more than once?

THE WITNESS: No. No. They showed them all to me and I kept on looking at them until I identify one.

MR. KANNER: How long did you look at those pictures before you identified one?

THE WITNESS: I was looking at them, but right after I saw it—I identified him right away.

MR. KANNER: Which of the features of the defendant enabled you to identify his picture?

MR. DEAN: Object, Your Honor.

THE COURT: Sustained.

MR. KANNER: Your Honor, I would like to proffer [fol. 52] this as long as the jury is out.

THE COURT: Go ahead.

THE WITNESS: This here, what he has here (indicating), his hair, his face, everything, because I will never forget it.

MR. KANNER: Was there something under the defendant's chin that helped you identify him?

THE WITNESS: No. Everything helped me to identify him.

MR. KANNER: What was it that you indicated as being under his chin?

THE WITNESS: Sort of a beard or something that we call a beard, very small.

MR. KANNER: Does he have that now?

MR. DEAN: Objection, Your Honor.

THE COURT: Sustained. It is obvious.

THE WITNESS: I don't know. I haven't even looked at him.

MR. KANNER: I have no further questions.

THE COURT: All right.

MR. KANNER: I have more questions, but let's bring the jury back.

MR. DEAN: Your Honor, can we have the purpose [fol. 53] for all of this questioning by Mr. Kanner?

THE COURT: The purpose of it was, I assume, to find out if the police suggested to her whom to pick out from all the photographs.

MR. DEAN: And Your Honor is excluding any testimony about any conversations that she had with the police officers as being hearsay; is that correct? The defendant certainly was not there. It is clearly hearsay.

THE COURT: There was nothing wrong with the manner in which the police handled it. So, I do not see anything objectionable.

MR. DEAN: All right.

THE COURT: If you want to put the same thing in in front of the jury, all right. Bring the jury in.

(Thereupon the jury returned to the courtroom.)

BY MR. KANNER:

Q I have some photographs, which are Defendant's Composite Exhibit 1, which I would like for you to examine (showing to witness).

Are these pictures of your house and of your neighborhood?

[fol. 54] A Yes.

MR. KANNER: Your Honor, I would like to introduce them out of turn, if I might, as Defendant's Exhibit 1.

MR. DEAN: The State has no objection.

THE COURT: Admit them, collectively, as Defense Exhibit 1 without objection.

(Thereupon the photographs were marked as Defense Exhibit A, Cumulative, in Evidence.)

BY MR. KANNER:

Q Am I correct, Mrs. Salas, in understanding that the defendant got into his car on 27th Street and Southwest 20th Avenue, approximately?

A If he came into my home?

THE COURT: Repeat the question.

BY MR. KANNER:

Q Am I correct in understanding that the defendant got into his automobile, when he was escaping, at Southwest 27th Street and 20th Avenue?

THE INTERPRETER: Repeat the question. She does not understand it.

BY MR. KANNER:

Q Where was the defendant's car parked when he [fol. 55] got into it?

A When he came into my home?

Q When he left your home.

A Two blocks from my home.

Q And was this approximately Southwest 27th Street and 20th Avenue?

A Northwest.

Q Excuse me. Northwest. Was this approximately Northwest—

A 27th Street and 21st Avenue.

Q Were you able to attract the neighbors by your hollering and screaming as you pursued the defendant?

A Yes.

Q Were there people congregated where the defendant finally got into his car?

A Yes.

Q Which finger of your hand, Mrs. Salas, were these rings on?

A (Indicating) On this one.

Q When you say "This one," which finger do you mean?

A (Indicating)

Q Were both rings on that finger?

[fol. 56] MR. DEAN: Indicating the finger next to the little finger on the right hand.

THE WITNESS: Yes.

BY MR. KANNER:

Q One was a wedding ring?

A Both of them.

Q Wedding ring and an engagement ring?

A Yes.

Q Did your neighbor, Estrella, see the defendant?

MR. DEAN: Objection, Your Honor, as to what someone else might have seen.

THE COURT: Sustained. There is a way to rephrase it.

BY MR. KANNER:

Q Was your neighbor, Estrella, attracted by your screams as you left the house?

A Yes.

Q Did she come to her window?

A No. When I came out, they were already out due to my yelling.

Q Who do you mean by "they"?

A Mr. Solis, and the lady at the corner of my house.

[fol. 57] Q Is this Estrella?

A No. Estrella is the next door neighbor.

Q Was Estrella outside?

A Yes. She was outside when she heard my yelling.

Q How long did Estrella stay outside?

A I don't know, because I just went out on my car. I don't know how long she was there.

Q Was Estrella outside when you left in your automobile?

A Yes.

Q Then Estrella and the defendant were outside at the same time; were they not?

A Estrella and the defendant?

Q Yes.

A Yes, because she saw him coming out.

Q Now, there were people in addition to Estrella and your neighbors who saw the defendant get into his car; were there not?

MR. DEAN: Object, Your Honor, as to what someone else might have seen.

THE COURT: Strike the word seen. Insert the word "present."

BY MR. KANNER:

[fol. 58] Q How many people were outside on the street?

MR. DEAN: I will—

MR. KANNER: When the defendant got into his automobile?

MR. DEAN: Objection, Your Honor, unless we have an area. It is 2:30 in the afternoon.

MR. KANNER: In the visible presence of the automobile.

THE COURT: Overruled.

THE WITNESS: Several neighbors came out. I did not count them, so I don't know. I can't tell you how many were there.

MR. KANNER: Excuse me. Miss Reporter, would you read that back.

MR. DEAN: Your Honor, I will object.

THE COURT: "Several neighbors were present. I don't know how many; I did not count them."

MR. KANNER: Thank you, Your Honor.

BY MR. KANNER:

Q After the robbery, Mrs. Salas, did you see any of the clothes that the defendant was wearing at that time?

A If I saw some of the clothing he was wearing? [fol. 59] I do not understand the question.

Q Have you seen the clothes that the defendant wore during the robbery?

A No.

Q Have you seen the gun again?

A No.

MR. KANNER: You may inquire.

THE COURT: Any redirect?

MR. DEAN: No, Your Honor. No redirect.

THE COURT: Tell the witness she may wait outside. We will not excuse her yet. Call your next witness.

(Witness excused.)

MR. DEAN: Mr. Pay.

THE COURT: Will he need an interpreter?

MR. DEAN: No, Your Honor.

Thereupon—

GILBERTO PAY,

was called as a witness on behalf of the State of Florida and, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DEAN:

Q State your name and address, please,
[fol. 60] A My name is Gilberto Pay, 1916 N. W. 33rd Street.

Q Mr. Pay, calling your attention to March 6, 1968, I ask you if you had an occasion to be in the vicinity of 27th Street between 19th and 20th Avenue.

A Yes, sir.

Q Here in Dade County?

A Yes, sir.

Q Which street were you on at the time?

A I was on 19th Avenue going north.

Q I will ask you if you had an occasion to see anything unusual?

A Yes, sir; I did. I saw Mrs. Salas. She was going south on 19th Avenue and—

Q Was that the woman who just testified?

A Yes, sir.

Q Was she in a car or on foot?

A She was in a car.

Q All right, sir. Were you in a car or were you on foot?

A I was in a car, too.

Q All right, sir. Were you going toward her?
[fol. 61] Yes, sir.

Q What did you observe?

A I saw that she was making a blowing of the horn and screaming and she was, you know, pointing outside the window.

Q What did you do, sir?

A I stopped, you know. I pulled to the side, so I don't know, I thought that she had an accident or something like that. I pulled to the side of the road.

Q Did you get out of the car or did you remain in your car?

A No. I remain in my car, sir.

Q I show you what has been marked as State's Exhibit 1-A for Identification and ask if you can identify that, sir (showing to witness)?

A Yes, sir.

Q Where have you seen that car before?

THE COURT: Could you speak up a little bit, sir, and speak into the microphone.

THE WITNESS: I saw the car. It was parked on 21st Avenue and 27th Street.

BY MR. DEAN:

[fol. 62] Q Which street was it on? Do you remember whether it was on the avenue or on the street?

A On the avenue.

Q It was on the avenue? And did you have an occasion to write down the license number of that car?

A Yes, sir; I did.

Q After you wrote down the license number, what did you do with it?

A I gave it to the police officer.

Q Was this a uniformed police officer?

A Yes, sir.

Q City of Miami?

A City of Miami.

Q Did you notice anyone or anything near the car?

A I saw a person get in the car.

Q Could you identify that person?

A Really, I can't, sir.

Q Did you see what he was wearing?

A He was wearing a green T-shirt. That is all I was able to see.

Q Could you tell, sir, whether he was white or colored?

A He was colored.

[fol. 63] Q Was there anyone else in the car?

A Not a person. It was a dog.

Q There was a dog in the car?

A Yes.

Q Where was the dog?

A In the back seat.

Q Do you know what color it was?

A I saw white.

Q Do you know what kind of a dog it was?

A No, sir.

Q After you saw this person get in the car, what did the person do?

A He got in the car and took off going south.
Q And you remained there until the Police came?
A Yes, sir.
MR. DEAN: I have no further questions, Your Honor. Thank you.

CROSS EXAMINATION

BY MR. KANNER:

Q Just one question, Mr. Pay.
A Yes, sir.
Q To the best of your recollection, how many people [fol. 64] were present when the defendant got into his car at the scene?
A Quite a few was there, sir.
Q Say more than three or four or five?
A Right, sir.
Q Do you have any idea, just approximately, how many?
A No, sir. There was quite a few because it was a house next to the corner and the people who lived there was outside.
MR. KANNER: No further questions.
MR. DEAN: I have no further questions.
THE COURT: You are excused, sir. Please remain outside the courtroom. Call your next witness.
(Witness excused.)

Thereupon—

HERBERT W. WELLS,

was called as a witness on behalf of the State of Florida and, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DEAN:

[fol. 65] Q State your name and official position, please.
A Officer Herbert W. Wells, City of Miami Police Officer, Dade County, Florida.

Q Thank you, sir. Were you so employed in that capacity on March 6, 1968?

A Yes, I was.

Q On that date, did you have an occasion to investigate a robbery that took place at 2841 N. W. 21st Avenue?

A Yes, I did.

Q During your investigation, did you have an occasion to receive a license number from someone?

A Yes, I did.

Q From whom, sir?

A Mr. Ray (phonetic), I believe his name was.

Q Pay?

A Pay or Ray; yes, sir.

Q How was that license number given to you?

A It was given by him to me while I was talking to the victim.

MR. KANNER: Excuse me. I did not understand [fol. 66] the last part of your answer. While you were talking to who, sir?

THE WITNESS: The victim.

MR. KANNER: Excuse me. I just did not hear you.

BY MR. DEAN:

Q Was that Maria Salas, the lady that is outside?

A Yes, it is.

Q Did Mr. Pay give you the license number on a piece of paper or verbally or how did he give it to you, sir, as you remember?

A I don't remember the exact way he gave it to me.

Q And you had occasion to make note of it in your report?

A Yes, I did.

MR. DEAN: I have no further questions.

THE COURT: Cross.

MR. KANNER: I have no questions.

MR. DEAN: You are excused, Officer.

THE COURT: Does either side want this officer to remain?

MR. DEAN: No, Your Honor.

THE COURT: You are excused.

[fol. 67] (Witness excused.)

MR. DEAN: Can we just have a brief recess? I am waiting for witnesses.

THE COURT: Court will be in recess for ten minutes. Take the jury out.

(Thereupon the jury retired from the courtroom.)

(Thereupon a short recess was taken, after which the following proceedings were had out of the presence of the jury:)

THE COURT: Is the State ready?

MR. DEAN: State is ready.

THE COURT: Are your people here yet?

MR. KANNER: Yes, Your Honor.

THE COURT: Can we swear them while the jury is out and instruct them as to the Rule?

Would you swear these three witnesses, please?

(Thereupon the witnesses were duly sworn.)

THE COURT: The Rule has been requested, and this means you are going to have to remain outside of the [fol. 68] courtroom and not discuss the case among yourselves or with anyone, other than counsel, and then not in the presence of each other.

(Witnesses retire from courtroom.)

(Thereupon the jury returned to the courtroom.)

THE COURT: Proceed.

Thereupon—

A. W. MITCHELL,

was called as a witness on behalf of the State of Florida and, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DEAN:

Q State your name and official position, please, sir.

A A. W. Mitchell, Sergeant of Police, Miami Police Department, Dade County, Florida.

Q You were so employed in that capacity on March 6, 1968, up unto the present time?
A Yes, sir.
Q Do you know the defendant, Johnny Williams?
A Yes, sir.
Q Would you point him out, please?
[fol. 69] A Right there (indicating).
MR. DEAN: Indicating the defendant, Johnny Williams.

BY MR. DEAN:

Q Did you have occasion to participate in his arrest?
A Yes, I did.
Q For the offense of robbery?
A Yes.
Q Where was the arrest made, sir?
A At his home.
Q 1049 N. W. 83rd Street?
A I believe that is it; yes, sir.
Q I show you what has been marked, Detective Mitchell, as State's Exhibit 1-A and ask you if you can identify that, sir.
A Yes. That is a T-Bird belonging to the defendant.
MR. KANNER: I object to any conclusion of the witness. He can testify where he took the picture or where the car was. I do not know if there is anything in evidence about who owns the automobile.
THE COURT: Sustained as to the conclusions. Strike that portion of his answer.

[fol. 70] BY MR. DEAN:

Q Can you identify where you have seen what that photograph represents before, sir?
A This photo represents a car parked at the defendant's home.
Q It was a photo taken of that car on the date of the arrest?
A Yes, sir.
Q Is this the scene as you saw it?
A Yes, sir.

MR. DEAN: I have no further questions, Your Honor.

THE COURT: Cross.

CROSS EXAMINATION

BY MR. KANNER:

Q Mr. Mitchell, what day was this arrest made, sir?
A This was the 11th of March.
Q I believe that was a Monday; was it not, sir?
A I believe so; yes, sir.
Q Who accompanied you on the search?
A That was Sergeant Horne, Phil Horne.
Q What department is he with?
[fol. 71] A He is with the Miami Police Department.
Q This address of the defendant, that is outside the city limits of Miami; is it not?
A Yes, sir; it is.

MR. KANNER: Your Honor, I have no further questions. I would like to excuse the jury.

THE COURT: Take the jury out.

(Thereupon the jury retired from the courtroom.)

MR. KANNER: Your Honor, I would like these charges to be dismissed against the defendant on the grounds that he was unlawfully arrested by two City of Miami Policemen outside the corporate areas of the City of Miami, and that this Court, therefore, has no proper jurisdiction over the defendant, and I cite to the Court the case of City of Coral Gables vs. Giblin, 127 So. 2d 914, where the Third District Court said this, Your Honor—and they talk about, Your Honor, whether Judge Giblin was arrested inside the City or outside the City and whether it was made in fresh pursuit or whether it was not.

The Court says this: "This contention would merit further examination and discussion were it not for the [fol. 72] obvious lack of authority of a municipal police officer to pursue and initially arrest an offender beyond the boundaries of the municipality.

"No authority has been cited us, and our research fails to disclose any statutes, special or general, that authorizes a municipal police officer to pursue and initially arrest an offender beyond his municipal territorial limits.

"See opinion of Attorney General, Florida, No. 55-24, 1955 . . ." And they cite two other cases.

On these grounds, Your Honor, I move that the charges be dismissed.

MR. DEAN: Your Honor, first of all, it is improper, in a motion to dismiss, to allege illegal arrest.

The State would move to strike defendant's motion as sham on that basis.

Second of all, the defendant's arrest cannot be attacked at this point, since he is in front of the jurisdiction of the Court.

THE COURT: That is the trouble. This is not timely made. It cannot be raised during trial. I will have to deny it.

[fol. 73] MR. KANNER: I have no further questions.

Yes, I do have some questions of Officer Mitchell not pertaining to the motion.

THE COURT: Bring the jury in.

(Thereupon the jury returned to the courtroom.)

BY MR. KANNER:

Q Just one further question, Officer: Was a search made of the defendant's automobile at the time of the arrest?

A Yes, sir; I think we did search it.

Q With the defendant's permission?

A That is right; yes, sir.

Q Now, was a search made of the defendant's premises at the time of the arrest?

A No, sir. We did not search the premises.

MR. KANNER: I have no further questions.

THE COURT: Does either side wish the officer to remain?

MR. KANNER: No. I have no need for Officer Mitchell.

THE COURT: You are excused.

(Witness excused.)

MR. DEAN: I have no further questions, Your [fol. 74] Honor. State rests.

MR. KANNER: The State rests?

MR. DEAN: Yes.

MR. KANNER: I would like to excuse the jury, Your Honor.

MR. DEAN: Before excusing the jury, I would rest subject to the introduction of State's Exhibit 1-A into Evidence.

MR. KANNER: I have no objection.

THE COURT: Without objection, then, admit State's Exhibit 1-A for Identification into Evidence as State's Exhibit 1.

(Thereupon State's Exhibit 1-A for Identification was marked as State's Exhibit 1 in Evidence.)

THE COURT: The State is resting at this time?

MR. DEAN: Yes, Your Honor.

THE COURT: We will have to excuse the jury for just another few minutes.

(Thereupon the jury retired from the courtroom.)

MR. KANNER: Your Honor, I would like to move for a directed verdict on the robbery charge at this [fol. 75] time on the grounds that the evidence presented, without any corroboration, does not prove beyond and to the exclusion of every reasonable doubt the defendant's guilt, and that the evidence not corroborated is conceivably consistent with a reasonable hypothesis of innocence.

THE COURT: I will deny it at this time.

Bring the jury back in.

(Thereupon the jury returned to the courtroom.)

THE COURT: Call your first witness.

MR. KANNER: She is coming, Your Honor.

Would you please take the stand, Mrs. Williams?

Thereupon—

VANILLA WILLIAMS,

was called as a witness on behalf of the defendant and, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KANNER:

Q For the record, would you please state your name.
[fol. 76] A Vanilla Williams.
Q You are married to the defendant, Johnny; are you not?
A Yes, I am.
Q How long have you been married?
A Twelve years.
Q Where were you and Johnny on Wednesday, the 6th of March, after 12:00 o'clock in the afternoon?
A State your question again.
Q Where were you, Mrs. Williams—Were you with Johnny Williams on March 6th when this robbery supposedly took place?
A Yes. Yes, I was.
Q Where were you and Johnny after noontime?
A We had gone over to my girl friend's house.
Q Who is that?
A Mary.
Q What is her last name?
A Scotty.
Q Now, did the defendant go with you?
A Yes.
Q What time did you get there?
[fol. 77] A I guess between 12:00, 12:30.
Q What time did you leave, to the best of your recollection?
A It was late in the evening.
Q Well, now, this jury is going to want to know a little bit better than "Late in the evening."
A I guess around—I can't say the time because I don't know. It was late in the evening.

Q Was it dark?
A No.
Q By evening, you mean afternoon?
A Yes.
Q Now, did you leave before suppertime?
A Yes. I had to go home and cook.
Q When you say "Late in the afternoon or the evening," what is the best recollection that you have, Mrs. Williams? These folks want to know, now, or, if you do not know, just tell me.
A I don't know; no.
Q Okay. Where is Mary Scotty's house?
A On 17th Avenue—Off of 17th Avenue.
Q Did you leave after 2:30?
A Yes; it was after 2:30.
Q After 2:30?
[fol. 78] A Yes.
Q Did the defendant stay with you?
A Yes.
Q In Mrs. Scotty's house?
A Right.
Q What did you and Mrs. Scotty and the defendant do or talk about; anything?
A Well, he didn't do very much talking. We was talking.
Q Where was the defendant?
A Well, when we first went in, all of us, you know, went in together, but after that, he went in the back.
Q In the back? What do you mean by that?
A It was a room back there. He went to lay down. He didn't feel very well.
Q Did he ever leave the house except with you?
A No.
Q Is there a door or anything out of this back bedroom?
A No. It is a bedroom.
Q Now, how is it that you are able to pinpoint this date down?
[fol. 79] A What, the 6th?
Q That is right.
A I know the 6th of every month.

Q Why? These jurors are grown people, now.
A Well, that is the time my period comes on.
Q Now, when you left the house, whose car were you going in, by the way?
A We had Johnny's car.
Q What time do you think you got there?
A Between 12:00 and 12:30.
Q What time, to the best of your recollection, did you leave the house?
A It was late in the evening.
Q Did you notice whether Johnny left his keys in the automobile when you went in there; do you remember whether he did?
A No, I don't.
Q You do not remember?
A No.
Q What, if anything, did you notice about the automobile when you came out, so far as its position was concerned?
[fol. 80] MR. DEAN: I will object, Your Honor. It is a leading question.
THE COURT: I will overrule that. Answer the question, if you can.
THE WITNESS: What was the question?

BY MR. KANNER:

Q What, if anything, did you notice about the position of the automobile when you came out?
A It looked like it had been moved.
MR. DEAN: Objection, Your Honor, as to what it looked like.
THE COURT: Overruled.

BY MR. KANNER:

Q Was it forward or backward?
A No. It just wasn't in the same spot where I thought we had parked it at.
MR. KANNER: I have no further questions.
THE COURT: Cross.

CROSS EXAMINATION

BY MR. DEAN:

Q Well, it was not in the same spot where you had parked it because Johnny had been out committing a robbery; isn't that true?

[fol. 81] MR. KANNER: Your Honor, I object to that, It is outside the scope of cross examination. It is totally improper. It is harassing and belittling and arguing with the witness.

MR. DEAN: If he does not want her to answer it, I will withdraw it, Your Honor.

THE COURT: All right.

BY MR. DEAN:

Q Mrs. Williams, approximately what time did you get to Mary's house?

A Around 12:00, 12:30.

Q And just the two of you went, you and Johnny?

A Yes.

Q About how long have you known Mrs. Scotty?

A I have known Mary for quite some time.

Q Just estimate, as best you can.

A Around a year.

Q About a year?

A Yes. A little longer.

Q What car did you drive over to Mrs. Scotty's house?

A We drove Johnny's car.

Q Was that a Thunderbird?

[fol. 82] A Yes.

Q White Thunderbird?

A Yes.

Q Mrs. Williams, I show you what has been marked as State's Exhibit No. 1, and ask you if this is the car (showing to witness)?

A (Affirmative nod of head.)

Q This is Johnny's car?

A Yes.

Q Do you have any dogs?

A Yes; we do have.

Q How many do you have?
A Three.
Q Did you take any—
A Four.
Q Did you take any of them with you when you went to the Scotty's house?
A No.
Q What kind of dogs do you have?
A A Great Dane, German shepherds and a terrier, toy terrier.
MR. KANNER: One more. That is three.

BY MR. DEAN:

Q You state a Great Dane—
A And another shepherd.
[fol. 83] Q Two German shepherds?
A Two big shepherds; yes.
Q Approximately how long were you at Mrs. Scotty's house before Johnny laid down?
A It wasn't very long, 'cause it was right after we had—just right after we had got in the house good. I guess about ten minutes.
Q Did you have anything to eat or drink before your husband laid down?
A I don't drink.
Q Did you see him eat or drink anything?
A No.
Q Would you say that it would be correct that Mr. Williams laid down at approximately 1:00 o'clock?
A I don't think it was that late.
Q A little earlier or a little later?
A I don't think it was that late; I don't know.
Q Earlier?
A About ten minutes after we got there.
Q Did he go to one of the bedrooms in the house?
A Yes.
[fol. 84] Q Was the door open or closed?
A It was open, cracked like.
Q Did you have an occasion to go in the bedroom at all from the time he went in to lay down until he got up?

A I peeped in there. I didn't go in.

Q You did not go in to have any conversation or anything?

A No.

Q You stated that from the time you got to Mrs. Scotty's house until you left, Johnny did not leave; is that correct?

A No; he did not leave.

Q Did you have occasion to leave the house?

A No; I didn't leave.

Q Did Mrs. Scotty have occasion to leave the house?

A No; she didn't leave.

Q In other words, all of you were there from approximately noon or a little bit before until late afternoon?

A Right.

Q Did anyone else come to the house, that you know [fol. 85] of, while Johnny was sleeping?

A Somebody knocked on the door, but who came to the door, I don't know 'cause I didn't bother to look.

Q You did not have any conversation with them?

A No. I didn't have any conversation.

MR. DEAN: Excuse me, Your Honor.

I have no further questions, Your Honor. Thank you.

THE COURT: Any redirect?

REDIRECT EXAMINATION

BY MR. KANNER:

Q One question: Do you own a white dog?

A No, sir.

MR. KANNER: No questions, Your Honor.

THE COURT: You are excused.

MR. KANNER: Would you please ask Mr. Scotty to come in and testify?

(Witness excused.)

[fol. 86] Thereupon—

MARY SCOTTY,

was called as a witness on behalf of the defendant and, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KANNER:

Q Would you please sit down beside the Court Reporter.

Would you please tell the jury your name.

A Mary Scotty.

Q Where do you live?

A 1720 N. W. 52nd Street.

Q Now, on Wednesday, March 6th, did you see the defendant and Mrs. Williams?

A Yes, I did.

Q How long have you known Mr. an Mrs. Williams?

A Well, a little over a year.

Q Would you tell me where you saw them?

A On March 6th?

Q Yes.

A At my apartment.

[fol. 87] Q Would you tell the jury, Mrs. Scotty, what time of day you saw them.

A Well, it was about—It was about 12:00 o'clock, because I was just getting up.

Q 12:00 o'clock lunch time or 12:00 o'clock—

A Lunch time.

Q Pardon me? 12:00 o'clock?

A About that.

Q How long were they there?

A Up until about 7:00, because I was fixing to get dinner and she said she had to go home and get dinner, also.

Q Where was Johnny Williams during all this time?

A Well, most of the time he was in my living room for a few minutes after he got to my house, and then

he said that he didn't feel good or something. He went in my bedroom and he laid down, across my bed.

Q Did he have occasion to leave between 12:00 and 7:00?

A No, he didn't.

Q Was he there all the time?

A Yes, he was.

[fol. 88] Q Now, how are you able, Mary, to pin down this date of March 6th? Now, this is almost six months ago.

A Yes, I know. Because, let's see, on March 8th, I was back to the hospital. I had just gotten out and he had been coming by.

Q You are talking too fast for this jury and for me, too.

A On March 8th, I was readmitted in the hospital. He had been coming by, you know, during the week to see if anything I needed, you know, anything, 'cause my husband was out of town. So, March 6th, he was there, because I remember that because I went to the hospital two days after, on the 8th.

MR. KANNER: You may inquire.

THE COURT: Cross.

CROSS EXAMINATION

BY MR. DEAN:

Q Mrs. Scotty, what month and day did this take place, that you are referring to?

A It was in March.

Q What day?

A On the 6th, because I went to the hospital on the 8th.

[fol. 89] Q Could it have been in February?

A No. It couldn't have been February, 'cause I was in the hospital on February.

Q Do you remember appearing in my office at 9:40 a.m. this morning?

A Yes, I do.

Q Do you remember giving testimony?

A Yes, I do.
THE COURT: Have you got a copy for Mr. Kanner?
MR. DEAN: No, I do not, Your Honor.
THE COURT: He can look over your shoulder.

BY MR. DEAN:

Q All right. Do you remember this question and this answer:

"Question: Okay. Was there an occasion before Johnny Williams was arrested when he and his wife were at your house?
"Answer: Yes, they were."

Do you remember that, ma'am?
A Yes, I do.
Q Do you remember this question:

[fol. 90] "Question: On what day was that?
"Answer: Well—it was—I think it was the 6th of February, like I said two days before I went back to the hospital. See, I was released on the—anyway, I brought my papers from there with me as to when I was released, then I went back.
"Question: Do you think it was about the 6th of February?
"Answer: Right."

A Yes; I remember that.
Q Is that correct or incorrect?
A That is correct, but I was mistaken about the month, because the reason I know I was mistaken, I got my bill from the hospital today and it was in March, not in February.
Q Approximately what time did Mr. Williams lie down?
A Approximately, I would say, 12:15, because he went in the living room no more than ten minutes after he came by my house.
Q Okay. Could you give me a time, approximately, that he went to lie down?
A I said approximately 12:15, you know, 12:30.

[fol. 91] Q About 12:15 or 12:30 he went to lie down?
A Yes.
Q Did Mr. Williams have anything to eat or drink before he laid down?
A No—Maybe he had a beer, because I had some beer at the house. I think he had one. I don't remember.
Q I would read you this question and answer, ma'am:

"Question: What time did he leave you and go and lie down? Just approximately?
"Answer: Approximately 2:00, maybe, 'cause we sat there and talk, we had a couple of beers—approximately 2:00 o'clock."

Do you remember that question and answer?
A Yes, I do.
Q Is that correct or incorrect?
A That is incorrect, because he wasn't there—he didn't sit up with us that long, so, it couldn't have been no 2:00.
[fol. 92] Q So, the testimony would be incorrect, then?
A Which one?
Q The statement made this morning.
A This morning; yes.
Q At 9:40.
While you were there with Mrs. Williams, did anyone else come to the house?
A A fellow came to the house; yes, he did.
Q Did he come inside the house?
A No, he didn't.
Q Did Mrs. Williams have any conversation with him?
A Yes, she did, because I didn't know who he was.
Q Do you know approximately how long she talked with him?
A No, I don't.
Q Had you ever seen him before?
A Had I ever seen him before?
Q Yes, ma'am.
A No, I haven't.
Q It is your testimony, then, that Johnny Williams [fol. 93] and Vanilla Williams and yourself were at your house on March 6th from approximately 12:00 o'clock noon until approximately 7:00 o'clock that evening?

A Yes.
Q And Johnny Williams never left?
A No.
Q And Mrs. Williams never left?
A No.
Q And you never left?
A No.
MR. DEAN: I have no further questions. Thank you, ma'am.
MR. KANNER: No questions.
THE COURT: You are excused. Thank you.

(Witness excused.)

MR. KANNER: Johnny, would you take the stand?

Thereupon—

JOHNNY WILLIAMS,

the defendant herein, was called as a witness in his own behalf and, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KANNER:

[fol. 94] Q Have you ever been convicted of a felony?
A Yes, sir; I have.
Q Did you commit this crime?
A No, sir.
Q I show you here Defendant's Exhibit 1 and ask you to examine it (showing to witness).
Have you examined those?
A Yes, sir.
Q Have you been inside that house?
A No, sir; I haven't.
MR. KANNER: You may inquire.

CROSS EXAMINATION

BY MR. DEAN:

Q Mr. Williams, I assume that at the time of this robbery, you were allegedly at Mrs. Scotty's house; is that correct?

A If you are referring to the robbery that is supposed to occurred on March 6; yes.

Q Approximately what time did you arrive there?

A Well, it was between 12:00 and 12:30 that day.

[fol. 95] Q Referring to State's Exhibit 1, is this your car (showing to witness)?

A Yes; this is my automobile.

Q And that is the car that you used that day?

A Yes, sir.

Q Did you leave the keys in the car?

MR. KANNER: Would you pinpoint the time and the place, Mr. Dean, please?

BY MR. DEAN:

Q March 6th, between 12:00 noon and 7:00 o'clock p.m.?

A I remember leaving the keys in it; yes.

Q Approximately what time did you lie down?

A After we got there, you mean?

Q Well, did you lie down after you got there?

A After we was there about ten, fifteen minutes, I left my wife and Mary watching TV and conversing, and I didn't feel too well. I had a headache and I asked her would it be all right to lie across the bed for a while, and I just slept longer than I intended to. So, I was asleep for a pretty good while before my wife woke me.

[fol. 96] Q Did you feel bad because it was the 6th of the month?

A No; I didn't feel bad because it was the 6th of the month.

Q You said you have been convicted of a felony. Isn't it more than one?

MR. KANNER: Your Honor, I object and ask to excuse the jury.

THE COURT: You opened the door. He can ask him how many times.

MR. KANNER: Your Honor, I would like to present law.

THE COURT: Take the jury out.

(Thereupon the jury retired from the courtroom.)

MR. KANNER: Judge, we have come too far to have a mistrial. I would like to cite to the Court the case of McArthur vs. Cook, which is a Civil case, 99 So. 2d 565, and in McArthur vs. Cook, Your Honor, they discussed the fact that the rules, so far as impeachment of witnesses are concerned, are identical in Civil and Criminal cases, and they go on and they say this, after citing Mead vs. State, which is really the landmark case in [fol. 97] Florida, although it really does not answer the question of how many times:

> "We there further emphasized that the proper procedural approach is simply to ask the witness the straight-forward question as to whether he had ever been convicted of a crime. The inquiry must end at this point unless the witness denies that he has been convicted. In the event of such denial the adverse party may then in the presentation of his side of the case produce and file in evidence the record of any such conviction. If the witness admits prior conviction of a crime, the inquiry by his adversary may not be pursued to the point of naming the crime for which he was convicted."
>
> Then it goes on to say, "If the witness so desires. . . ."

Now, Your Honor, in all candor to the Court, there is one case which I have here that I will find in a second—I think it was Lockwood vs. State, 107 So. 2d 770, where this was the testimony:

> "Have you ever been convicted of a crime. . . ."

[fol. 98] "Answer: Yes."

And the question was:

> "How many times?"
> "Answer: Once."

Then there was an objection.

Your Honor, there is dicta in the Lockwood case to the extent—and it is just nothing but dicta, Your Honor—but to the extent that he may, then, if the defendant has been convicted more than once, that the prosecutor may then ask one more question: How many times.

But it is certainly, I think, only dicta, Your Honor. I think that the law in Florida as stated in McArthur vs. Cook, that the inquiry must end when the defendant admits that he has been convicted, and under no circumstances, Your Honor, is the State Attorney to be allowed to recite the crimes for which the defendant has been convicted.

I submit to the Court, Your Honor, that the inquiry must end once the defendant has admitted that he has been convicted and that there is no further inquiry permissible.

MR. DEAN: I do not tend to go to specific crimes, Your Honor.

[fol. 99] The defendant stated he has been convicted of a felony, and I intend to show he has been convicted of more than one.

THE COURT: I think the law is clear on that.

MR. KANNER: I feel that in the Lockwood case, Your Honor, where they discuss it, that it is clear from the Lockwood case that that is dicta.

Lockwood discusses Mead vs. State and they say something to the effect, well, if he has been convicted, maybe they can ask it, but they really do not decide it, Your Honor.

THE COURT: Then we really do not have any firm knowing on the point, one way or the other, and I have always understood that those two questions can be asked, and had you not opened the door on direct examination, your point might be stronger.

I am going to let him ask how many times and that is all.

MR. DEAN: Yes, sir.

THE COURT: I will not permit the question the way you phrased it; rephrase it.

MR. DEAN: Yes, Your Honor.

[fol. 100] (Thereupon the jury returned to the courtroom.)

BY MR. DEAN:

Q Mr. Williams, how many times have you been convicted of a felony?

MR. KANNER: I will stipulate that he has been convicted six times.

THE COURT: So stipulated.

MR. DEAN: No further questions.

THE COURT: Do you have any redirect?

MR. KANNER: Defense rests.

THE COURT: Do you have any rebuttal?

MR. DEAN: Yes, Your Honor.

THE COURT: Call your first rebuttal witness.

MR. DEAN: Officer Wells.

Thereupon—

HERBERT W. WELLS,

was recalled as a witness on behalf of the State of Florida and, having been previously duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION

MR. DEAN: Mr. Robbins, ask Mrs. Scotty to come in and stand, please, and not say anything.

[fol. 101] (Mrs. Scotty enters the courtroom.)

MR. DEAN: Thank you, ma'am. You can go.

(Mrs. Scotty retired from the courtroom.)

BY MR. DEAN:

Q Officer Wells, did you have an occasion to see the woman who just came into the courtroom identified as Mary Scotty, in the yellow dress?

A Yes.

Q Did you see her when she came into the courtroom just now?

A Yes, I did.

Q Have you seen her previously?

A Yes.

Q Did you have an occasion to see her on March 6, 1968?

A Yes, I did.

Q Was this while you were investigating the robbery at the home of Maria Salas?

A Yes.

Q Under what circumstances did you see Mrs. Scotty?

[fol. 102] A I was inside the house making the report out.

THE COURT: What house, Officer?

THE WITNESS: It was the house of the victim.

THE COURT: Tell the jury the address.

THE WITNESS: 2841 N. W. 21st Avenue.

I was making the robbery report out, talking to the victim, when—I didn't know the name of the lady at the time—came and knocked on the door and asked for directions to a certain place.

BY MR. DEAN:

Q Did you have occasion to talk to her?

A At the time, I did. I explained the direction to where she was going, but I don't remember.

Q You do not remember exactly what was said?

A No, I don't.

Q Approximately what time was this?

A It was approximately between 3:40 and 3:50.

Q How do you set the time, Officer Wells?

A Well, I arrived on the scene at 3:40 p.m., and I had just started making the report. So, it was between 3:40 and 3:50 when she came by.

[fol. 103] MR. DEAN: I have no further questions, Your Honor.

THE COURT: Cross examination.

CROSS EXAMINATION

BY MR. KANNER:

Q What about Mrs. Scotty's appearance at the time, Officer Wells, attracted your attention to her?

A Well, she approached me and— What do you mean by that, sir?

Q Do you remember what she was wearing that day?

A As far as the clothing, no, I do not.

MR. KANNER: I have no further questions.

THE COURT: Any redirect?

MR. DEAN: No, Your Honor.

THE COURT: You are excused, Officer.

(Witness excused.)

THE COURT: Do you have any further rebuttal?

MR. DEAN: Could I have just one moment, Your Honor?

THE COURT: Yes. Do you have any further wit-
[fol. 104] nesses?

MR. DEAN: No, Your Honor.

THE COURT: Do you have any surrebuttal?

MR. KANNER: Defense rests.

I would like to excuse the jury and go over the charges.

THE COURT: That is permissible. That will take about ten minutes or so.

Take the jury out.

(Thereupon the jury retired from the courtroom.)

MR. KANNER: We are moving along so fast, I would like to take about ten minutes.

THE COURT: I have no objection.

Does anybody have any charges typed up?

MR. KANNER: Yes, sir.

MR. DEAN: Do you have any copies?

(Handing to Court and Mr. Dean.)

THE COURT: We will take Defendant's Requested Charge No. 1 first.

Defendant's Requested Instruction No. 1 is denied. After 1955, the Statute was changed and armed robbery and robbery were merged into a single Statute and this was no longer necessary.

[fol. 105] It is sufficient to prove that a person used force, fear or violence. This instruction was proper before 1955 but not after 1955. No. 1 is denied.

No. 2—

MR. KANNER: Standard circumstantial evidence, Your Honor.

MR. DEAN: The State would object to a circumstantial evidence charge, Your Honor.

MR. KANNER: Your Honor, the fact that the defendant has owned this automobile or was in possession

of this automobile and that the license number was taken by Mr. Pay is a circumstance. It is not direct evidence that the defendant was involved.

We have the victim's testimony that the defendant got in this car, but she is the only eyeball witness we have, Your Honor.

MR. DEAN: Your Honor, the fact that there is an eyeball witness obliterates any circumstantial evidence charge.

THE COURT: That is true.

Requested Instruction No. 2 is denied.

MR. DEAN: The State would object to No. 3, Your Honor.

[fol. 106] THE COURT: It is incorporated in the General Charge but not in this exact language.

Let me set this aside for just a minute and go on to something else.

MR. KANNER: Judge, on this fourth Instruction, there is a Florida case—I did not cite it with the Instruction, but there is a Florida case on this, that supports this false in one and false in the other.

THE COURT: There is a Florida case, which I am familiar with, and the Instruction is that if there are conflicts in the evidence, you will reconcile those conflicts, if you can—

MR. KANNER: That is the ordinary Instruction.

THE COURT: And if there are conflicts which you cannot reconcile, the jury will accept that testimony which they believe to be true and reject that testimony which they believe to be false. That is in the General Instruction.

So, to the extent that, inasmuch as four is incorporated, in substance, I will deny it as written but I will give it because it is part of the General Instruction.

[fol. 107] No. 5 is denied. There is no admitted perjurer in this case.

MR. KANNER: Right.

MR. DEAN: I believe 6 is incorporated in your General Charge as to credibility, Your Honor.

THE COURT: That is incorporated in the General Charge, the witness' interest or lack of interest and everything else is included in the General Charge.

I have a General Instruction on alibi, which is considerably more lengthy than the Requested Instruction No. 7, and which covers some two pages in the form book, which, frankly, I think is a better Instruction.

MR. KANNER: Okay, Your Honor. I just want an alibi instruction.

THE COURT: That will be granted.

MR. DEAN: I believe the Court has a General Instruction on No. 8.

THE COURT: 8 will be granted either in this form or the form that I have.

Let me give you the form that I have so you can decide which one.

MR. KANNER: If you have got a—

[fol. 108] THE COURT: Well, I know what you are doing. You are taking these from the Federal Jury Practice Instructions, but let me give it to you from here.

MR. KANNER: Judge, I am not quibbling about the words that you use in the Instruction.

Judge, we do have one problem here that I would like to discuss with my client and that is whether to instruct the jury on lesser included offenses.

THE COURT: There is another thing here, this Instruction No. 3, that we have not passed on yet.

Let me get that out of the way and then we will go into that.

Here is the Alibi Instruction. Do you want to hear it before it is given?

MR. KANNER: If you want, Your Honor.

THE COURT: It is up to you.

> "Where alibi is relied upon as a defense, it is not necessary that it should be proven beyond a reasonable doubt in order to be effective. It is sufficient to require an acquittal if the evidence as to alibi raises
> [fol. 109] a reasonable doubt in the minds of the jurors whether the defendant was present at the time of the alleged crime."

MR. KANNER: Your Honor, this sounds fine.

THE COURT: All right.

Let's look at No. 3.

Let me ask you this. This is, again, not in the same language, but I have a rather lengthy charge on credibility of the witnesses.

MR. KANNER: Your Honor, if the subject is covered in your General Instructions, I am not—

THE COURT: Well, it is not covered in the exact same language.

MR. KANNER: If it is the same idea, that is fine.

THE COURT: Yes. In substance, it is the same.

MR. DEAN: Your Honor, I have no objection to this Instruction being given as long as the Alibi Instruction is withdrawn, because, since there is an alibi given, there is a refutation of the testimony as presented.

In other words, the charge says the jury is not re-
[fol. 110] quired to accept the unrefuted testimony of a witness, and I think the witness has testified and there have been contradictions.

THE COURT: Let me incorporate it in the General Charge, because it is in there. Let me just show 3 as withdrawn.

Let me read this to you so that I can get your approval on this because that is the only other one, that is No. 8.

> That is this: "Gentlemen of the jury, there was testimony that the defendant has previously been convicted of crimes. This does not, as a matter of law, disqualify him to testify and does not, as a matter of law, tend to prove that he committed the crime with which he is charged today.
>
> "The only consideration you are entitled to give that circumstance is if, in your experience, it so dictates, you may believe that a person who has been convicted of a crime is more likely to tell an untruth than one who has not been so convicted.
>
> "However, the law does not assume that a person
> [fol. 111] convicted of a crime will more quickly lie than one who has not been convicted.
>
> "If, however, in your experience, it is such that you believe he would, you are entitled to give that consideration in determining the truth of his testimony,"

which is the lengthier charge from the Florida case.

MR. KANNER: That is fine, Your Honor.

THE COURT: Then, 8 is withdrawn.

MR. KANNER: Your Honor, I would like an Instruction as to the penalty that robbery incurs.

THE COURT: Granted.

MR. KANNER: And I would like about four minutes to talk to my client as to whether we should include a larceny charge.

THE COURT: Granted. We will take a brief recess. Just let me know.

MR. KANNER: Yes, sir.

THE COURT: State has opening and closing. How long do you think you are going to require to argue this case?

MR. KANNER: I am going to be very short: 45 [fol. 112] minutes or an hour to argue it.

MR. DEAN: That is probably what I will be.

(The trial reconvened pursuant to the taking of a brief recess, and the following proceedings were had out of the hearing of the jury:)

THE COURT: Did you make a decision?

MR. KANNER: Yes, we did. We do not want a larceny charge.

Does your reasonable doubt include evidence or lack of evidence?

THE COURT: Yes.

MR. KANNER: I want that.

Your Honor, if the Court please, during the recess, I have discussed with Mr. Williams the Supreme Court case which allows us the right to request a Jury Instruction on lesser included offenses, and we have discussed this matter in pros and cons at length, and he has, Mr. Williams has agreed with my own opinion that we do not, Your Honor, not wish an Instruction on larecny.

[fol. 113] THE COURT: All right, sir. Now, let me ask you this—Would you ask Mr. Dean to come in here?

MR. KANNER: Your Honor, we do not wish any lesser included crimes.

THE COURT: All right.

(Mr. Dean enters courtroom.)

THE COURT: Mr. Dean, Mr. Kanner has waived the requirement of lesser included offenses. The only thing that I question is, under Rule 1:510, which is the lesser included offense of attempt—that is the only thing that it includes—it says the Court shall charge the jury in this regard.

Now, I am just looking at this one case, Griffin vs. State. I think it may be properly waived. I just want to see if there is any prohibition on it.

MR. KANNER: Your Honor, for the record, I would like to again make a motion for directed verdict of acquittal.

THE COURT: Denied.

This is a case where the Instruction was requested [fol. 114] and refused. I am going to grant your request and charge only on the offense charged in the Information. That is what you want; right?

MR. KANNER: Yes.

THE COURT: No lesser included offenses at all?

MR. KANNER: That is correct, Your Honor.

THE COURT: Bring in the jury.

(Thereupon the jury returned to the courtroom.)

THE COURT: You may proceed, sir.

(Thereupon counsel for the respective parties argued to the jury, which is omitted from this transcript at the request of counsel for the defendant.)

THE COURT: Gentlemen of the jury, the hour now being 5:00 p.m., the Court is going to recess this case until 9:00 a.m. tomorrow morning, at which time I will charge you as to the law.

In excusing you this evening, I am going to permit you to go your separate ways with the further admonition that you still have not heard the charge of the Court [fol. 115] on the law that you are to apply to the facts as you find them from the evidence, and until this has been done and you have had the opportunity to deliberate

among yourselves, you are not now to set your mind upon any determination of the issues as to the guilt or innocence of this defendant.

This you shall not do until you have had an opportunity to hear the law and deliberate among yourselves.

I am going to permit you to go your separate ways and I am going to further admonish you that you are not to discuss this case among yourselves nor with your families, nor with your friends or neighbors.

You are not to read anything about this case, should anything appear in any of the news media.

You are not to watch any television reports or listen to any radio broadcasts concerning this case, if, indeed, there be any.

The Court would ask that you be here promptly at 9:00 a.m., since this is the first order of business the Court will take up, is the charging of the jury as to the law.

At this time, I would ask that when you come into [fol. 116] the building tomorrow, you abide by the same admonition the Court gave you during the luncheon break: If you are in the cafeteria, corridors or elevators, permit no one to discuss the case with you or speak to you about it. Discuss it with no one. Avoid being where you may hear conversation about the case.

Report to the Bailiff at 9:00 a.m. and the trial will resume at that time.

At this time, I will remand you to the custody of the Bailiff and excuse you for the evening.

(Thereupon the jury retired from the courtroom.)

THE COURT: Court is in recess until 9:00 a.m.

(Thereupon a recess was taken until August 16, 1968, at 9:04 a.m.)

[fol. 117]

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

No. 68-1466

STATE OF FLORIDA, PLAINTIFF

vs.

JOHNNY WILLIAMS, DEFENDANT

TRANSCRIPT OF TESTIMONY—August 16, 1968

The above-entitled case was resumed before the Honorable Paul Baker, Judge of the above-styled court, and a jury, at the Metropolitan Dade County Justice Building, Miami, Florida, on the 16th day of August, 1968, commencing at 9:04 o'clock a.m.

APPEARANCES:

DENIS DEAN and EDWARD A. CARHART,
Assistant State Attorneys,
Miami, Florida,

on behalf of the State of Florida.

RICHARD KANNER, ESQ.,
Specially Appointed Public Defender,
Miami, Florida,

on behalf of the Defendant.

[fol. 118] THE COURT: Would you bring in the panel? Secure the courtroom.

(Courtroom secured.)

THE COURT: We are agreed on the main charge?
MR. KANNER: Yes, Your Honor.
MR. DEAN: Yes, Your Honor.
THE COURT: Bring in the jury.

(Thereupon the jury entered the courtroom.)

MR. DEAN: The State concedes the presence of the jury, waives polling, Your Honor.

MR. KANNER: Yes, sir, Your Honor.

[fol. 119] CHARGE TO JURY

THE COURT (Baker, J.): Gentlemen of the jury, you have heard the evidence in the case of the State of Florida vs. the defendant, Johnny Williams. It now becomes the duty of this Court to charge you as to the law that you will apply to the facts as you find them.

The State of Florida, by Information filed in this Court, charges the defendant, Johnny Williams, with the crime of robbery, charging in the body of the Information:

"In the name and by authority of the State of Florida:

"Alfonso C. Sepe, Assistant State Attorney of the Eleventh Judicial Circuit of Florida, prosecuting for the State of Florida, in the County of Dade, under oath, Information makes that Johnny Williams, on the 6th day of March, 1968, in the County and State aforesaid, did unlawfully and feloniously make an assault upon Maria Salas, and did by force, violence or putting in fear, rob, steal, take and carry away
[fol. 120] from the person or custody of said Maria Salas, and against her will, certain monies, goods or other property, to-wit: two rings, said property being the subject of larceny and the property of Maria Salas, in violation of 813.011 of the Florida Statutes, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida."

To this Information, gentlemen, the defendant has entered his plea of not guilty. The Information, together with the plea, form the issue which you, as jurors, are to decide.

The Statute which this defendant is charged with having violated reads as follows:

"Whoever, by force, violence or assault or putting in fear, feloniously robs, steals and takes away from

the person or custody of another, money or other property which may be the subject of larceny, shall be punished by imprisonment in the State Prison for life or for any lesser term of years, at the discretion of the Court."

[fol. 121] The Court charges you, gentlemen, that the gist of the crime of robbery is the felonious taking by the accused of money or other things of value.

The Court charges you further that the amount of money or the value of the property taken is immaterial. It is sufficient that the State carry its burden if they show, in fact, that something of value was taken.

The defendant enters into the trial of this case, gentlemen, clothed with a presumption of innocence, and that presumption remains with him throughout the trial or until the State, if it can, overcomes that presumption and proves his guilt to your satisfaction beyond and to the exclusion of every reasonable doubt.

The burden of proof is upon the State to prove all the material allegations in the Information to your satisfaction and beyond a reasonable doubt, and if the State does that, it is your duty, as jurors, under your oaths, to find the defendant guilty.

[fol. 121A] But, gentlemen, if the State fails to do that, then under your oaths, you are to give the defendant the benefit of any reasonable doubt and acquit him.

The Court charges you that a mere suspicion of guilt or possibility of guilt or probability of guilt is insufficient to convict.

The test is beyond and to the exclusion of a reasonable doubt.

By reasonable doubt is meant a real doubt arising from the evidence or lack of evidence in the case, and not just a mere fanciful or imaginary doubt, but one for which you can give your minds and conscience a satisfactory reason after considering all of the facts and circumstances of the case.

It is that stage of the case, gentlemen, which after a consideration of the entire testimony, the jurors' minds are in that condition that they cannot say they feel an

abiding conviction to a moral certainty of the truth of the charge.

You gentlemen are the sole judges of the credibility of [fol. 122] the witnesses and of the weight and credit to be given their testimony.

In determining this, you will look to all of the facts and circumstances of the case, the witnesses manner of testifying, their demeanor on the witness stand, their intelligence, their bias or prejudice, if the same should appear from the trial, their means and opportunity of knowing the facts about which they have testified, their interest or lack of interest in the outcome of the case, the probability or improbability of their testimony and the reasonableness or unreasonableness of their testimony.

If you find conflicts in the evidence, you gentlemen will reconcile those conflicts, if you can, without imputing perjury to any witness.

But if you find conflicts you cannot reconcile, then take that testimony which you believe to be true and reject that testimony which you believe to be false.

The defendant, Johnny Williams, has testified in this case, which he has a right to do under the laws of the [fol. 123] State of Florida, and you gentlemen will measure his testimony by the same rules the Court has given you in its charge as to the testimony of other witnessrs.

You gentlemen may believe the testimony of the defendant in preference to that of any other witness testifying, if you believe it is entitled to that much weight and credit. It is solely for you, the jury, to say how much weight and credit you will give the testimony of the defendant and the testimony of all the witnesses who have testified in this case.

There has been some mention made in this case that there are persons who were not called as witnesses for either the State or the defense and who may have knowledge about this case or may be able to corroborate some of the testimony of other witnesses who have testified in this case.

The Court instructs you that neither party to this case is obligated to call as witnesses all persons who

may have some knowledge about matters testified in this court. It is the right of the State and of the defense to choose the manner of conducting their respective cases and to subpoena as witnesses any person whom they find and upon whom they care to rely.

[fol. 124] You gentlemen are instructed that you are not to assume or guess what such persons might say if they were here to testify. You must rely solely upon the evidence that has been presented during the course of this trial.

The defendant in this case relies on a defense of what is known as alibi. The Court charges you, gentlemen, that where alibi is relied upon as a defense, it is not necessary that it should be proven beyond a reasonable doubt in order to be effective.

It is sufficient to require an acquittal if the evidence as to alibi raises a reasonable doubt in the minds of the jury as to whether the defendant was present at the scene of the alleged crime, if, in fact, such crime was committed.

If the jury should believe from the evidence that the defendant was not present at the place where and the time when the crime charged against him was committed, or if you should, from the evidence or lack of evidence, entertain a reasonable doubt whether the defendant was present, then in either event you should find the defendant not guilty.

However, gentlemen, the proof of alibi must include [fol. 125] and cover the entire time when the presence of the accused was required to commit the offense charged.

Gentlemen, there was testimony in this case that the defendant, Johnny Williams, has previously been convicted of crimes. That does not, as a matter of law, disqualify him from testifying and does not, as a matter of law, tend to prove that he committed the crime with which he stands charged in this Information.

The only consideration the jury is entitled to give the circumstance of his previous convictions is if your experience so dictates, you may believe a person who has been convicted of a crime is more likely to tell an untruth than one who has not been convicted.

However, the law does not assume that a person convicted of a crime will more quickly lie than one who has not been convicted.

If, however, in your experience, it is such that you believe he would, you are entitled to give that consideration in determining the truth of his testimony.

The Court further charges you, gentlemen, the fact [fol. 126] that an Information has been filed in this Court charging this defendant with a crime is not to be considered by you as an indication of the guilt of this defendant.

An Information is merely a legal document. It is the vehicle by which the defendant is brought before the Court and informed of the charge against him and that is the only weight and credit that you are to give it.

The Court further charges you that attorneys conducting the trial of the case are officers of this Court and are not permitted to take the witness stand and testify.

At the conclusion of this trial, you heard the argument of counsel. This is that time provided by law during the course of the trial for the attorneys to sum up and argue the evidence to you in a light most favorable to their case. It is argument and nothing more and this is the only weight and credit that you are to give it.

During the course of this trial, gentlemen, various rulings have been made by this Court. From these rulings or from anything that has occurred during this trial, you are not to infer what the opinion of this Court may [fol. 127] be as to the guilt or innocence of the accused.

With the Court's opinion you have nothing whatever to do, and if you have even a suspicion of what the Court may think in the matter, you have no right to consider it, any more than you would have the right to consider the opinion of anyone else.

The question of the guilt or innocence of the defendant is for you alone to decide regardless of what anyone else may think about it.

This Court makes no suggestion to you what has or has not been proven. These are matters of fact solely within the province of the jury.

You gentlemen should confine your deliberations to the

evidence that has been presented during the course of this trial.

In arriving at your verdict as to whether the defendant is guilty or not guilty, you gentlemen should not be swayed by sympathy for the defendant nor by prejudice against him because of the type of charge or for any other reason, and you gentlemen are not to concern yourselves with the penalty that may be imposed should the defendant be found guilty. That, gentlemen, is the duty and responsibility of the Court.

[fol. 128] There has been prepared for you a form of the verdict, which reads as follows:

> "In the Criminal Court of Record in and for Dade County, Florida, Case No. 68-1466, the State of Florida vs. Johnny Williams. Verdict: We, the jury, at Miami, Dade County, Florida, this 16th day of August, A.D., 1968, find the defendant"—naming him—"Johnny Williams"—and thereafter, gentlemen,

on the form of the verdict is a blank space.

If, after a full and fair deliberation, the jury's mind is in that condition that it believes the State has carried its burden and proven the truth of the charge laid in the Information beyond and to the exclusion of every reasonable doubt and the jury votes to convict the defendant of the crime of robbery, then in the blank space after the name, "Johnny Williams," you will write the words: "Guilty as charged."

If, however, after a full and fair deliberation, the jury's mind is in that condition that they do not believe the State has carried its burden and that they have failed to prove the truth of the charge and you vote to acquit this defendant, then after the name, "Johnny [fol. 129] Williams," you will write the words: "Not guilty."

The Court charges you, gentlemen, that each juror is responsible for his own verdict, but the verdict of this jury must be the unanimous verdict of all six of you.

I want your verdict to be dated, closed with the words: "So say we all," and signed by one of your number as Foreman.

Your first business upon entering the jury room should be to select a Foreman so that you may carry out orderly deliberations.

In any event, gentlemen, let your verdict speak the truth, as you find it.

You may take with you the Information, the form of the verdict and such physical evidence as has been introduced during the course of this trial, and when you have reached a verdict, if you will knock on the door and inform the Bailiff he will so advise the Court.

If, during the course of your deliberations, any question should arise, knock on the door, inform the Bailiff and he will so advise the Court.

At this time, gentlemen, you may retire and consider your verdict.

[fol. 130] (At 9:21 a.m., the jury retired to consider of their verdict, and at 10:44 a.m., the following proceedings were had:)

(Defendant returns to the courtroom.)

THE COURT: Bring in the panel, please.

MR. CARHART: Mr. Dean is not here.

THE COURT: It does not make any difference. You can take the verdict for him. Time is important. Bring in the panel, please.

(Thereupon the jury returned to the courtroom.)

THE COURT: Do both sides concede and waive the polling of the jury?

MR. CARHART: Yes, Your Honor.

THE COURT: Gentlemen of the jury, have you reached a verdict?

THE FOREMAN: We have.

THE COURT: Would you hand it to the Clerk, please.

(Handing to Clerk and Court.)

THE COURT: Publish the verdict.

[fol. 131] THE CLERK: (Reading): "In the Criminal Court of Record in and for Dade County, Florida, Case No. 68-1466, the State of Florida vs.

Johnny Williams. Verdict: We, the jury, at Miami, Dade County, Florida, this 16th day of August, A.D., 1968, find the Defendant Johnny Williams guilty as charged. So say we all. Wendell Hays, Foreman."

THE COURT: Does either side wish the jury polled?
MR. KANNER: Yes, Your Honor.
THE COURT: Poll the jury.

(Thereupon the Clerk polled the jury, and in response to the question: "Is this your verdict?" each juror answered in the affirmative.)

MR. KANNER: Your Honor, on this case, I would like about 15 days to file a motion for new trial.

THE COURT: All right.

Johnny Williams, you have been found guilty of the crime of robbery by a jury. You are adjudicated guilty by the Court.

[fol. 132] What, if anything, have you to say why sentence should not be passed upon you? I will hear from you, if you wish.

MR. KANNER: Your Honor, I have no knowledge of any legal impediments why sentence should not be imposed.

MR. CARHART: Your Honor, this is the seventh felony conviction for this defendant and the fourth robbery conviction. I believe this is a person that should not receive any leniency on the part of the Court.

THE COURT: Is there anything you wish to say?

THE DEFENDANT: No, sir, your Honor, I have nothing to say.

THE COURT: Johnny Williams, it is the sentence of this Court that you be confined at hard labor in the State Penitentiary for the remainder of your natural life.

I will grant you 15 days to file motions.

(Thereupon the trial was concluded.)

[fol. 133]

[Reporter's Certificate (Omitted in Printing)]

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

No. 68-1466

JOHNNY WILLIAMS

DEFENDANT'S REQUESTED INSTRUCTION # 1—
Filed August 16, 1968

ROBBERY

In order to justify conviction of robbery by a person armed, it is necessary to establish intent of the perpetrator at the time of assault to kill or maim his victim if resisted.

(1) Arnold v. State 83 So.2d 105 (1955)
(2) Ex parte Wilson 14 So.2d 846 (1943)

Denied

/s/ Paul Baker
Judge

No. 68-1466

JOHNNY WILLIAMS

DEFENDANT'S REQUESTED INSTRUCTION # 2—
Filed August 16, 1968

EVIDENCE

When circumstantial evidence is relied upon for conviction in a criminal case, the circumstances, when taken together, must be of a conclusive nature leading on the whole to a reasonable and moral certainty that the accused and no one else committed the offense. If the facts and proof are equally consistent with some other rational conclusion then of guilt, the evidence is insufficient. If the evidence leaves it indefinite as to which of several hypothesis is true, such evidence cannot amount to proof however great the probability may be. Circumstantial evidence which leaves nothing more than a suspicion that the accused committed the crime is not sufficient to sustain a conviction.

Harrison v. State 104 So.2d 391

Denied

/s/ Paul Baker
Judge

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

Case No. 68-1466

THE STATE OF FLORIDA

vs.

JOHNNY WILLIAMS

VERDICT—Filed August 16, 1968

We, the jury, at Miami, Dade County, Florida, this 16 day of August A.D., 1968, find the defendant,

JOHNNY WILLIAMS, GUILTY AS CHARGED

So Say We All.

/s/ Wendell J. Hays
Foreman

BENCH DOCKET

IN THE CRIMINAL COURT OF RECORD
DADE COUNTY, FLORIDA

Case No. 68-1466

Charge, Robbery

STATE OF FLORIDA

vs.

JOHNNY WILLIAMS

JUDGMENT—August 16, 1968

It appearing unto this Court that you Johnny Williams have been regularly tried and convicted of Robbery

IT IS THEREFORE THE JUDGMENT of the law and it is hereby adjudged that you are and stand convicted of the offense as above set forth.

What have you to say why sentence should not now be imposed upon you?

Saying nothing that could influence the Court in its decision.

SENTENCE

IT IS FURTHER CONSIDERED, ORDERED AND ADJUDGED that you be imprisoned by confinement at hard labor in the STATE PENITENTIARY for a term of the remainder of your natural life.

DONE AND ORDERED in open Court at Miami, Dade County, Florida, this 16 day of August A.D. 1968.

/s/ Paul Baker
Judge

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

No. 68-1466

STATE OF FLORIDA

—*vs.*—

JOHNNY WILLIAMS

MOTION FOR NEW TRIAL—Filed August 23, 1968

The defendant moves for a new trial on the grounds that the court committed the following reversible errors:

1. The court erred in denying the defendant's motion for a protective order.
2. The court erred in denying the defendant's to empanel a twelve man jury.
3. The court erred in denying the defendant's request for an instruction on circumstantial evidence.
4. The court erred in not granting the defendant's motion for a directed verdict made at the close of the state's case and again at the close of all of the testimony, on the grounds that the evidence presented was not sufficient to convict.
5. The court erred in not dismissing the charges when the testimony disclosed that the defendant was illegally arrested.
6. The court erred in allowing the prosecution to bring out the number of times that the defendant had been previously convicted of a felony.

A copy of this motion was mailed to the State Attorney this 23 day of August, 1968.

/s/ Richard Kanner
Attorney for Defendant
609 Professional Arts Center
1150 N. W. 14th Street
Miami, Florida 33136
377-9711

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA
DIVISION "D"

68-1466

STATE OF FLORIDA

vs.

JOHNNY WILLIAMS

MINUTE BOOK ENTRY—August 28, 1968

Denis A. Dean, Assistant State Attorney.
Richard Kanner, Counsel for the Defendant.
Reported by: Sylvia Burrow.
Richard Kanner, Counsel for the Defendant, Johnny Williams, presented a Motion for a New Trial, which motion the Court denied.

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

No. 68-1466

STATE OF FLORIDA

—*vs.*—

JOHNNY WILLIAMS

NOTICE OF APPEAL—Filed September 24, 1968

JOHNNY WILLIAMS, defendant, takes and enters his appeal to the Florida Supreme Court to review the final order and judgment of conviction of the Criminal Court of Record In and For Dade County, Florida, entered on August 15, 1968, and rendered upon the denial of the appellant's motion for new trial on August 28, 1968. All parties to said cause are called upon to take notice of the entry of this appeal.

/s/ Richard Kanner
Attorney for Defendant
1150 N. W. 14th Street
Miami, Florida 33136

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

No. 68-1466

STATE OF FLORIDA

—*vs.*—

JOHNNY WILLIAMS

ASSIGNMENTS OF ERROR—Filed September 24, 1968

The defendant assigns the following errors in this cause:

1. The court erred in denying the defendant's motion to empanel a twelve man jury.
2. The court erred in denying defendant's motion for an order protecting the defendant from disclosing the defendant's alibi witnesses.
3. The court erred in denying defendant's request for an instruction on circumstantial evidence.
4. The court erred in not granting the defendant's motion for a directed verdict made at the close of the state's case, and again at the close of all of the testimony, on the grounds that the evidence presented was not sufficient to convict.
5. The court erred in not dismissing the charges when testimony disclosed that the defendant was illegally arrested.
6. The court erred in allowing the state to bring out the number of times that defendant had been previously convicted of a felony.

A copy of this motion was mailed to the State Attorney this 24 day of September, 1968.

/s/ Richard Kanner
Attorney for Defendant
1150 N. W. 14th Street
Miami, Florida 33136

[Certificate of the Clerk of the Court
(Omitted in Printing)]

IN THE SUPREME COURT OF FLORIDA

Case No. ———

JOHNNY WILLIAMS, APPELLANT

—*v*—

STATE OF FLORIDA, APPELLEE

MOTION TO TRANSFER

Comes now appellee, by and through its undersigned attorneys, and moves this court for entry of an order transfering said cause to the District Court of Appeal, Third District, Florida, and in support thereof says:

I.

That the jurisdiction of this court has been improvidently invoked. The notice of appeal filed in this court shows on its face that the appeal is taken from a judgment of conviction in the Criminal Court of Record, in and for Dade County, Florida. Appeals from trial courts may be taken directly to this court only from judgments imposing the death penalty. Rule 2.1a.(5)(a), Florida Appellate Rules.

EARL FAIRCLOTH
Attorney General
WALLACE E. ALLBRITTON
Assistant Attorney General

[Proof of Service (Omitted in Printing)]

IN THE SUPREME COURT OF FLORIDA

No.

JOHNNY WILLIAMS, APPELLANT

—*vs.*—

STATE OF FLORIDA, APPELLEE

RESPONSE

The appellant, in response to the appellee's motion to transfer this cause to the District Court of Appeal, Third District, would show that this court has jurisdiction because the final judgment passed directly upon the validity of a State Statute, and the final judgment further construed a controlling provision of both the Florida and Federal Constitutions.

1. The constitutionality of Florida Statute 913.10, allowing a six man trial jury, was directly attacked by the defendant's motion for the court to empanel a twelve man jury. This motion was denied, ruling in effect that this Statute is constitutional.

2. The constitutionality of Florida Criminal Procedure Rule 1.200, providing that the defendant furnish the State the names of defendant's alibi witnesses, was directly attacked on two separate grounds by the defendant's motion for the court to enter a protective order.

(a) The notice of alibi rule is a rule of substantive law, and accordingly is not authorized by Article 5, Section 3, of the Florida Constitution, which limits the rule making power of the Florida Supreme Court to adopt rules of practice and procedure only, or elsewhere in the Florida Constitution or Florida Statutes.

(b) The notice of alibi rule compels the defendant in a criminal case to be a witness against himself in violation of the Florida Declaration of Rights, Section 12, and the 5th and 14th Amendment of the United States Constitution.

WHEREOFRE, the appellant prays that the appellee's motion to transfer be denied.

A copy of this pleading was mailed to the Attorney General this 10 day of October, 1968.

/s/ Richard Kanner
Attorney for Appellant
1150 N. W. 14th Street
Miami, Florida 33136

IN THE SUPREME COURT OF FLORIDA

Case No. 37,848

JOHNNY WILLIAMS, APPELLANT

vs.

STATE OF FLORIDA, APPELLEE

ORDER OF TRANSFER—November 22, 1968

Following the entry of its order of November 11, 1968, transferring this cause to the District Court of Appeal of Florida, Third District, the Court has considered the objections filed by the appellant protesting the transfer. The jurisdictional aspects of the matter have been carefully re-examined. Finding that the record fails to present a cause within the direct appellate jurisdiction of this Court, the Court adheres to its order of November 11, 1968, transferring the cause to the District Court of Appeal of Florida, Third District.

cc: Honorable Wallace E. Allbritton
Honorable Richard Kanner
Honorable William P. Carter
Honorable J. F. McCracken

A

[NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DISPOSED OF.]

IN THE DISTRICT COURT OF APPEAL OF FLORIDA THIRD DISTRICT

JANUARY TERM, A.D. 1969

Case No. 68-1017

JOHNNY WILLIAMS, APPELLANT

vs.

STATE OF FLORIDA, APPELLEE

OPINION—Filed April 29, 1969

An Appeal from the Criminal Court of Record for Dade County, Paul Baker, Judge.

Richard Kanner, for appellant.

Earl Faircloth, Attorney General, Jesse J. McCrary, Jr., and Melvin Grossman, Assistant Attorney Generals, for appellee.

Before CHARLES CARROLL, C.J., and HENDRY and SWANN, JJ.

PER CURIAM.

This is defendant's appeal from a conviction of robbery. His first point on appeal is that the trial court erred in denying his motion for a protective order which he made in response to the State's demand for disclosure of alibi witnesses pursuant to Rule 1.200, Florida Rules of Criminal Procedure.

Appellant argues that the notice of alibi rule is a rule of substantive law, and accordingly is not authorized by Article 5, Section 3, of the Florida Constitution.[1]

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[1] Article 5, Section 3 of the Florida Constitution provides as follows: "The practice and procedure in all courts shall be governed by rules adopted by the Supreme Court." Florida Rule of Criminal Procedure 1.200 was adopted by the Florida Supreme Court, In Re Florida Rules of Criminal Procedure, Fla. 1967, 196 So.2d 124, 148.

Appellant's next point is that Rule 1.200, supra, violates his privilege against self-incrimination as provided by the Florida Declaration of Rights, Section 12, and the Fifth and Fourteenth Amendments of the United States Constitution.

We find no substantial merit in either of these two points on appeal.

Appellant's third and last point raises the question of whether his constitutional rights were violated when the trial court denied his request for a trial by a jury of twelve instead of six. The trial court ruled that the appellant was entitled, under Florida law, to a jury consisting of only six persons; the state contends that the trial court was correct in this ruling. We agree, and base our holding on the United States Supreme Court's ruling in the case of Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444 (1968).

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 323 Misc., October Term, 1969

JOHNNY WILLIAMS, PETITIONER

v.

FLORIDA

On petition for writ of Certiorari to the District Court of Appeal of the State of Florida, Third District.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—December 8, 1969

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 927 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 372638 414

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 927

JOHNNY WILLIAMS,

Petitioner,

vs.

FLORIDA.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF FOR PETITIONER

RICHARD KANNER
Attorney for Petitioner
1150 N. W. 14th Street
Miami, Florida

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 927

JOHNNY WILLIAMS,

Petitioner,

vs.

FLORIDA.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF FOR PETITIONER

I.

Opinion Below

The opinion of the District Court of Appeal of Florida, Third District, dated April 29, 1969, is reported at 224 So. 2d 406 (R. 93, App. p. 13).[1]

II.

Jurisdiction—Constitutional Provisions Involved

The petition for certiorari to this Court, directed to the District Court of Appeal of Florida, Third District, was granted December 8, 1969 (R. 95). Jurisdiction is conferred

[1] R. designates the record appendix. App. designates the appendix to this brief.

upon this Court by 28 U.S.C., §1257(3), because the trial court's failure to protect petitioner from disclosing the name of his alibi witness forced petitioner to be witness against himself and the empanelling of a six man jury over petitioner's objection constituted a denial of a jury trial, both of which constitute violations of due process of law.

III.

Questions of Law Presented

A. Is it a denial of due process and right not to be a witness against yourself for petitioner to be compelled to advise the state of his alibi witnesses?

B. Is it a denial of due process to deny petitioner's motion to be tried by a twelve man jury?

IV.

Statement of the Case

Defendant on trial for robbery, moved (R. 5) for an order protecting him from disclosure of his alibi witnesses, required by Florida Rules of Criminal Procedure[2] on the grounds *inter alia*:

> The notice of alibi rule compels the Defendant in a criminal case to be a witness against himself in violation of the Florida Declaration of Rights, Section 12 and the Fifth and Fourteenth Amendment of the United States Constitution.

[2] Fla. Cr. P.R. 1.200 (App. p. 11).

and also for the court to empanel a twelve man jury[3] (R. 3, 9 & 87).

The motions were denied (R. 4 & 6) and defendant complied with the demand after which the alibi witness was subpoenaed to the state attorney's office prior to trial to present her testimony (R. 58). The petitioner was convicted and sentenced to life (R. 86).

ARGUMENT

I.

Pretrial Disclosure of Alibi Witnesses Compels Defendant to Be a Witness Against Himself

The requirement that the defendant disclose his alibi witnesses to the prosecuting attorney prior to trial or be unable to use them violates the Fifth Amendment.[4]

> No person * * * shall be compelled in any criminal case to be a witness against himself.

While this Amendment ordinarily tests patently incriminating practices,[5] the literal mandate is "to be a witness against himself". It is this mandate which is violated because while the alibi witness rule is only latently and

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[3] Fla. Stat. 913.10 provides for a six-man jury in non-capital cases (App. p. 12).

[4] *Malloy* v. *Hogan*, 378 U.S. 1 applies the Fifth Amendment to the States.

[5] E.g., *Marchetti* v. *United States*, 390 U.S. 39; *Griffin* v. *California*, 380 U.S. 609; *Garrity* v. *New Jersey*, 385 U.S. 493; *Spevack* v. *Klein*, 385 U.S. 511; *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70; *Haynes* v. *United States*, 390 U.S. 85.

by practical application incriminating, it still requires a defendant to furnish information which the state will use to its own advantage in an effort to convict.

The mandate of the Fifth Amendment precludes the prosecutor from ever extrajudicially questioning an indicted defendant.[6] This was its historical intent recognized in *Brown* v. *Walker,* 161 U.S. 591, 597:

> So deeply did the inequities of the ancient system impress themselves upon the minds of the American colonists that the states, with one accord, made *a denial of the right to question an accused person a part of their fundamental law,* so that a maxim which in England was a mere rule of evidence became clothed in this country with the impregnability of a constitutional enactment (emphasis supplied).

Boyd v. *United States,* 116 U.S. 616 quoted from an English trespass case, contemporary to the drafting of the Fourth and Fifth Amendments and reasoned it was indicative of the Amendment's sanctity (116 U.S. at 630):

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions, on the part of the Government and its employees, of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal

[6] Cf. *Massiah* v. *United States,* 377 U.S. 201.

> security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense; it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.

and furnished a guide to their interpretation (116 U.S. at 635):

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*. We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first

presentation, from noticing objections which become developed by time and the practical application of the objectionable law.

The practical application test mentioned in *Boyd* when applied *sub judice* is of real concern and renders the notice of alibi rule fundamentally unfair because:

1. The defendant cannot intelligently decide until the close of the state's case whether he wishes to testify or offer any defense other than his presumption of innocence was not overcome beyond a reasonable doubt. His failure to come forth with his alibi witnesses after having complied with the alibi notice rule will certainly become known to the jury by way of opening and closing statements.

2. The disclosure of defense witnesses can subject these witnesses to *ex parte* examination from a state attorney who can subpoena them to testify without benefit of counsel, and to coercion and intimidation by overly zealous law enforcement officers. These practices are not available to a defendant who cannot act under color of office. Nor would a threatened defense witness feel as a practical matter that he could complain to prosecuting authorities for relief as would a state's witness harassed by an unscrupulous defendant.

The Fifth Amendment in the context *sub judice* is similar to the defendant's Sixth Amendment right to obtain favorable witnesses. *Washington* v. *Texas,* 388 U.S. 14, 19, held:

> The right to offer the testimony of witnesses, and to compel their attendance if necessary, is in plain terms the right to present a defense * * *. Just as an accused has the right to confront the prosecution's witnesses

> for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

The Court recognized in *Garrity* v. *New Jersey*, 385 U.S. 493, 500 "There are rights of constitutional statute whose exercise a State may not condition by the exaction of a price" and in *Marchetti* v. *United States, supra*, 390 U.S. at 57:

> The Government's anxiety to obtain information known to a private individual does not without more render that information public; if it did, no room would remain for the application of the constitutional privilege. Nor does it stamp information with a public character that the Government has formalized its demands in the attire of a statute; if this alone were sufficient, the constitutional privilege could be entirely abrogated by any Act of Congress.

State cases upholding similar alibi provisions[7] have answered the issue on some type of implied waiver theory rejected in *Marchetti* v. *United States, supra*, 390 U.S. at 51,[8] or that the evidence is exculpatory and the witnesses will become known at trial anyway. These conclusions betray the intent of the Founders framing the Amendment and are not practically sound.

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[7] Cases are collected in 55 Journal of "Criminal Law, Criminology and Police Science," 29 and 30 A.L.R.2d 480, "Notice of Alibi Statute."

[8] "To give credence to such 'waivers' without the most deliberate examination of the circumstances surrounding them would ultimately license widespread erosion of the privilege through 'ingeniously drawn legislation.'"

II.

Six Persons Cannot Constitute a Jury

Duncan v. *Louisiana*, 391 U.S. 145 applying the Sixth Amendment to the States sufficiently outlines the history of the jury which need not be elaborated. The reasons why the number twelve finally evolved appears lost in history but there is no dispute that the jury known to the common law meant twelve persons—neither more nor less[9] and this standard was incorporated in the Sixth Amendment.[10] The Amendment would have been redundant to set out this detail because a jury of twelve reaching a unanimous verdict was the only type jury known:[11]

> The right to twelve is a substantial one.[12]
>
> (T)he wise men who framed the Constitution of the United States and the people who approved it were of opinion that life and liberty, when involved in criminal prosecutions, would not be adequately secured except through the unanimous verdict of twelve jurors. It was not for the State, in respect of a crime committed within its limits while it was a Territory, to dispense with that guarantee simply because its people had reached the conclusion that the truth could

[9] *Thompson* v. *Utah*, 170 U.S. 343.

[10] *Callan* v. *Wilson*, 127 U.S. 540.

[11] *Springville* v. *Thomas*, 166 U.S. 707.

[12] Fla. Stat. 73.071 provides for a twelve man jury in all eminent domain cases, 69 Col. L.R. 419. "Trial by Jury in Criminal Cases" notes that only five states have less than twelve man juries for felonies.

> be as well ascertained, and the liberty of an accused be as well guarded, by eight as by twelve jurors in a criminal case. *Thompson* v. *Utah*, 170 U.S. 343, 353.

and undoubtedly insures a more representative community sampling in the venire.

The construction, favorable to the defendant, suggested in *Boyd, supra*, should also apply here; to permit a six man jury is no different in principle from a one man jury or even an advisory jury.

Conclusion

The judgment below should be reversed and the petitioner discharged.

Respectfully submitted,

RICHARD KANNER
Attorney for Petitioner

APPENDIX.

RULE 1.200 NOTICE OF ALIBI

Upon the written demand of the prosecuting attorney, specifying as particularly as is known to such prosecuting attorney, the place, date and time of the commission of the crime charged, a defendant in a criminal case who intends to offer evidence of an alibi in his defense shall, not less than ten days before trial or such other time as the court may direct, file and serve upon such prosecuting attorney a notice in writing of his intention to claim such alibi, which notice shall contain specific information as to the place at which the defendant claims to have been at the time of the alleged offense and, as particularly as is known to defendant or his attorney, the names and addresses of the witnesses by whom he proposes to establish such alibi. Not less than five days after receipt of defendant's witness list, or such other times as the court may direct, the prosecuting attorney shall file and serve upon the defendant the names and addresses (as particularly as are known to the prosecuting attorney) of the witnesses the State proposes to offer in rebuttal to discredit the defendant's alibi at the trial of the cause. Both the defendant and the prosecuting attorney shall be under a continuing duty to promptly disclose the names and addresses of additional witnesses which come to the attention of either party subsequent to filing their respective witness lists as provided in this rule. If a defendant fails to file and serve a copy of such notice as herein required, the court may exclude evidence offered by such defendant for the purpose of proving an alibi, except the testimony of the defendant himself. If such notice is given by a defendant, the court may exclude the testimony of any witness offered by the defendant for the purpose of proving an alibi if the name and address of such witness as particularly as is known to defendant or his attorney is not stated in such notice. If the prosecuting attorney fails to file and serve a copy on the defendant of a list of wit-

nesses as herein provided, the court may exclude evidence offered by the state in rebuttal to the defendant's alibi evidence. If such notice is given by the prosecuting attorney, the court may exclude the testimony of any witness offered by the prosecuting attorney for the purpose of rebutting the defense of alibi if the name and address of such witness as particularly as is known to the prosecuting attorney is not stated in such notice. For good cause shown the court may waive the requirements of this rule.

913.10 NUMBER OF JURORS AND ALTERNATE JURORS.—

(1) Twelve men shall constitute a jury to try all capital cases, and six men shall constitute a jury to try all other criminal cases.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

JOHNNY WILLIAMS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

PER CURIAM.

This is defendant's appeal from a conviction of robbery. His first point on appeal is that the trial court erred in denying his motion for a protective order which he made in response to the State's demand for disclosure of alibi witnesses pursuant to Rule 1.200, Florida Rules of Criminal Procedure.

Appellant argues that the notice of alibi rule is a rule of substantive law, and accordingly is not authorized by Article 5, Section 3, of the Florida Constitution.[1]

Appellant's next point is that Rule 1.200, supra, violates his privilege against self-incrimination as provided by the Florida Declaration of Rights, Section 12, and the Fifth and Fourteenth Amendments of the United States Constitution.

We find no substantial merit in either of these two points on appeal.

Appellant's third and last point raises the question of whether his constitutional rights were violated when the

[1] Article 5, Section 3 of the Florida Constitution provides as follows: "The practice and procedure in all courts shall be governed by rules adopted by the Supreme Court." Florida Rule of Criminal Procedure 1.200 was adopted by the Florida Supreme Court, In Re Florida Rules of Criminal Procedure, Fla. 1967, 196 So.2d 124, 148.

trial court denied his request for a trial by a jury of twelve instead of six. The trial court ruled that the appellant was entitled, under Florida law, to a jury consisting of only six persons; the state contends that the trial court was correct in this ruling. We agree, and base our holding on the United States Supreme Court's ruling in the case of Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444 (1968).

Affirmed.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1969

No. 927

JOHNNY WILLIAMS, *Petitioner,*

vs.

STATE OF FLORIDA, *Respondent.*

On Writ of Certiorari to the Florida District Court of Appeal, Third District

BRIEF AMICUS CURIAE ON BEHALF OF VIRGIL JENKINS

STATEMENT AS TO INTEREST OF AMICUS CURIAE

Virgil Jenkins, on whose behalf this brief *amicus curiae* is filed, is currently serving a 50 year sentence in the state penitentiary at Lansing, Kansas, having been convicted of the crime of robbery. There has been prepared and will shortly be filed in the District Court of Sedgewick County, Kansas a Motion to Vacate

Sentence[1] on behalf of Mr. Jenkins asserting, *inter alia*, that his conviction was obtained in violation of the Fifth and Fourteenth Amendments to the United States Constitution because of the invocation at his trial of the Kansas "alibi" statute, Section 62-1341 of the Annotated Statutes of Kansas. He has filed this *amicus curiae* brief because there is a substantial probability that any decision as to the constitutionality of Rule 1.200 of the Florida Rules of Criminal Procedure which might be rendered in this case would also be controlling in his own case; moreover, as will appear, the facts of *amicus'* case demonstrate more clearly—and, perhaps, more compellingly—than the case now before the Court the arbitrary and unconstitutional fashion in which alibi-notice procedures operate to infringe rights specifically protected by the Constitution of the United States.

Amicus was charged with participation in the robbery of a Wichita motel in the early hours of the morning on July 26, 1967. He was arrested later in the morning along with two other men; items found on their persons and in the car in which they were riding strongly suggested that all or some of them were participants in the robbery.

After the conclusion of the prosecution's case-in-chief, the defense at first indicated that it was not its intention to call any witnesses. Thereafter, counsel for

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[1]Under Kansas procedure, a Motion to Vacate Sentence, which is filed pursuant to KANSAS GEN. STATS. ANN. § 60-1507, serves in lieu of a petition for habeas corpus as the manner by which a criminal conviction is collaterally attacked much as motions to vacate under 28 U.S.C. § 2255 serve in the federal courts.

the defense moved to reopen the case and called defendant Virgil Jenkins to the stand. He proceeded to testify that he was in a poolhall between the hours of midnight and approximately 3:00 A.M. on the night of the robbery, and thereafter was picked up by one of the two other men found in the car at the time of his arrest. The import of this testimony, of course, was that he could not have participated in the robbery because, at the time of its commission, he was somewhere else.

At this point, the prosecutor objected and moved that the defendant's entire testimony be striken on the ground that it constituted an alibi, and that no notice thereof had been given as required.[2] This ob-

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[2]KANSAS GEN. STATS. ANN. § 62-1341 (1964) provides as follows:

In the trial of any criminal action in the District Court, where the complaint, indictment or information charges specifically the time and place of the offense alleged to have been committed, and the nature of the offense is such as necessitated the personal presence of the one who committed the offense, and the defendant proposes to offer evidence to the effect that he was at some other place at the time of the offense charged, he shall give notice in writing of that fact to the county attorney. The notice shall state where defendant contends he was at the time of the offense, and shall have endorsed thereon the names of witnesses which he proposes to use in support of such contention.

On due application, and for good cause shown, the court may permit defendant to endorse additional names of witnesses on such notice, using the discretion with respect thereto now applicable to allowing the county attorney to endorse names of additional witnesses on an information. The notice shall be served on the county attorney as much as seven days before the action is called for trial, and a copy thereof, with proof of such service, filed with the clerk of the court: *Provided,* On due application and for good cause shown the court may permit the notice to be served at any time before the jury is sworn to try the action.

In the event the time and place of the offense are not specifically stated in the complaint, indictment or information, on application of defendant that the time and place be definitely

jection was sustained, and Mr. Jenkins' entire testimony was struck. On appeal, the Kansas Supreme Court upheld this ruling (*State v. Jenkins*, 203 Kan. 354, 454 P.2d 496 (1969), incorporating by reference the ruling in a companion case, *State v. Kelly*, 203 Kan. 360, 454 P.2d 501 (1969)).[3]

In the present case, Petitioner Williams had sought from the Florida courts a pre-trial order protecting him from disclosure of the names of his alibi witnesses which under Florida law were required to be

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stated in order to enable him to offer evidence in support of a contention that he was not present, and upon due notice thereof, the Court shall direct the county attorney either to amend the complaint or information by stating the time and place of the offense as accurately as possible, or to file a bill of particulars to the indictment or information so stating the time and place of the offense, and thereafter defendant shall give the notice above provided if he proposes to offer evidence to the effect that he was at some other place at the time of the offense charged.

Unless the defendant gives the notice as above provided he shall not be permitted to offer evidence to the effect that he was at some other place at the time of the offense charged. In the event the time or place of the offense has not been specifically stated in the complaint, indictment or information, and the Court directs it be amended, or a bill of particulars filed, as above provided, and the county attorney advises the Court that he cannot safely do so on the facts as he has been informed concerning them; or if in the progress of the trial the evidence discloses a time or place of the offense other than alleged, but within the period of the statute of limitations applicable to the offense and within the territorial jurisdiction of the Court, the action shall not abate or be discontinued for either of those reasons, but defendant may, without having given the notice above mentioned, offer evidence tending to show he was at some other place at the time of the offense.

[3]No petition for certiorari was filed from that ruling, Mr. Jenkins' counsel being of the opinion that there might be some possible question as to whether the federal question was fully raised with respect to the alibi issue in the Kansas courts. For that reason, it was decided that a Motion to Vacate Sentence should first be brought in the trial court and, if relief should be denied by the state courts, to then seek certiorari in this Court. It was to that end that the pending Motion to Vacate was filed.

disclosed to the prosecution. Unsuccessful in that effort, he complied with the requirement, presumably on pain of the extreme sanction—exclusion of the defendant's evidence of an alibi—which attends to those who fail to give the specified notice. In *amicus'* case, however, notice was never given, and as a consequence he was not allowed to prove that he was somewhere other than at the scene of the alleged offense at the time of its commission. Indeed, Mr. Jenkins was not allowed to *personally give testimony at his own trial.* (This portion of the trial transcript is reproduced in Exhibit "A" herein.)

The case of *amicus,* then, presents a factual variation from the case now before the Court; it is one, we believe, which reveals the operation of the alibi-notice rule, as it exists in states such as Florida and Kansas, in its most vicious dress. Two entirely distinct constitutional questions are, we submit, presented by such a provision: *First,* whether the State may constitutionally compel the defendant in a criminal case to give the prosecution notice as to the nature of the defense it intends to offer, together with the names and addresses of the witnesses it intends to call in support of that defense; and *second,* even if that requirement is constitutional, whether it may be enforced by excluding the evidence respecting that defense—including the defendant's own testimony—as the penalty for failure to comply with the notice requirement. These are substantial questions, and they are clearly presented by the case of Virgil Jenkins. He was not allowed to offer critical evidence—his own testimony—which, if believed by the jury, would have

compelled his acquittal. This *amicus curiae* brief examines the constitutional questions described above which such a practice raises in the hope that it will further illuminate the issues now before the Court.

SUMMARY OF ARGUMENT

1. It is the constitutional right of the defendant, secured by the privilege against self-incrimination, to refrain from assisting the prosecution in any way in securing his own conviction. This absolute right of silence reflects our Anglo-American notion of due process in criminal proceedings, in which the burden of proof is imposed upon the prosecution, with the defendant privileged to stand moot and put the prosecution to its proof. Only after the defendant has heard the prosecution's case against him need he decide whether to waive that privilege and to offer evidence of innocence. There are substantial reasons why an innocent defendant might prefer not to do so, and it is only *after* the prosecution has rested its case that he will be able intelligently to decide whether to waive his right of silence. The requirement that the defendant give advance notice of an alibi defense violates this Due Process structure, and offends the constitutional protections afforded the accused by the Fifth and Fourteenth Amendments by compelling a decision in advance of trial as to whether an alibi defense will be offered.

2. Even if the prosecution may compel the defense to give advance notice of an alibi defense, it may not

foreclose him from offering evidence of his innocence as the penalty for mere non-compliance with that requirement. The prosecution's legitimate interests may be adequately protected by other, less onerous, means (such as a continuance of the trial); to deny wholly the defendant the right to prove his innocence is a blatant denial of Due Process of Law.

ARGUMENT

INTRODUCTION

This case presents for decision the constitutionality of a practice by which a defendant in a criminal case forfeits his right to offer evidence of his innocence (and, in some states including Kansas, even to testify on his own behalf) if he has for any reason failed to give notice of his intention to present an "alibi" defense at his trial.[4] In many states, this compulsory prior notice must be accompanied by a list of the names and addresses of the witnesses the defense intends to call in support of the alibi defense.

This procedure, which compels the accused to assist the prosecution in sealing his conviction, is at the least a curious departure from our accusatorial tradition.[5] Moreover, it punishes even non-willful failures

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[4]At least one state, while requiring advance notice of an intention to present an alibi defense, protects the interests of the prosecution by allowing for a continuance when the defense, without having given notice, seeks to present evidence of an alibi but does not prevent the defendant from making the defense. See note 22, infra.

[5]While a majority of American jurisdictions manage to do without the alibi-notice procedure, the practice is sufficiently widespread to justify this Court's review. In addition to Florida, we are aware of fifteen states having alibi-notice requirements.

to comply with the notice requirement with total suppression of what may be a controlling aspect of the defense. Surprisingly, its constitutionality has, until this case, seldom been questioned. Those few reported decisions considering challenges to the alibi statutes have, moreover, confined their analysis to only one of what we conceive to be two entirely separate aspects of their constitutional infirmity; thus there has been consideration—and rejection—of the contention that the privilege against self-incrimination is violated by the requirement that the accused give prior notice of his intention to offer an alibi defense, but virtually no consideration of whether that requirement, even if constitutional, may be enforced by the sweeping denial of the defendant's right to present evidence in his defense.[6]

Eight require, in addition to the notice of an intention to assert an alibi defense, a list of witnesses the defendant intends to call. ARIZ. R. CRIM. P. 192(B)(1959); IND. ANN. STAT. §§ 1631-33 (1956); KAN. GEN. STAT. ANN. § 62-1341 (1964); MICH. COMP. LAWS § 768.20-.21 (Supp. 1956); N.J. RULES 3:5-9 (1958); N.Y. CODE CRIM. P. § 295-1 (1958); PA. R. CRIM. PRO. 312, 19 P.S.App.; WIS. STAT. § 955.07 (1961). Seven others require only the notice as to the intended defense. IOWA CODE § 777.18 (1962); MINN. STAT. § 630.14 (1961); OHIO REV. CODE ANN. § 2945.58 (Page 1964); OKLA. STAT. tit. 22 § 585 (1961); S.D. CODE § 34.2801 (Supp. 1960); UTAH CODE ANN. § 77-21-17 (1964); VT. STAT. ANN. tit. 13, §§ 6561-62 (1959).

[6]The principal decisions of which we are aware are *Rider v. Crouse*, 357 F.2d 317 (10th Cir. 1966); *State v. Stump*, ... Iowa ....., 119 N.W.2d 210 (1963); *State v. Smetna*, 131 Ohio St. 329, 2 N.E.2d 778 (1936); *State v. Thayer*, 124 Ohio St. 1, 176 N.E. 656 (1931) (with three judges expressing the view that the alibi statute is unconstitutional); *People v. Shulenberg*, 279 App. Div. 1115, 112 N.Y.S.2d 374, 375 (1952); *People v. Rakiec*, 260 App. Div. 452, 23 N.Y.S.2d 607, 612-13 (1940) (holding, however, that the statute does not apply to the testimony of the defendant but only to other witnesses); *People v. Schade*, 161 Misc. 212, 292 N.Y.S. 612, 615-19 (1936); *Commonwealth v. Vecchiolli*, 208 Pa. Super. 483, 224 A.2d 96 (1966); *State v. Kopacka*, 261 Wis. 70, 51 N.E.2d 495, 497-98 (1952).

We think it particularly fitting that at this time the Court undertake a review of the entire question. There appears to have been no really serious canvassing of the constitutionality of these alibi statutes since this Court made applicable to state criminal proceedings the protections of the Fifth Amendment privilege against self-incrimination.[7] Moreover, recent developments of constitutional doctrine put into clearer perspective the basis of the constitutional claim which, as noted, has never been adequately canvassed by the lower courts—whether the defendant may be wholly disabled from presenting evidence (sometimes, as in the case of *amicus*, including his own testimony)[8] establishing a vital defense, simply because of his failure to comply with a procedural requirement that he give prior notice of that defense.

Perhaps it is well to preface our analysis with the observation that we do not urge the Court to test this Florida procedure by a subjective standard of fairness. To be perfectly candid, *Spencer v. Texas*, 385 U.S. 554 (1967) makes it abundantly clear that an argument premised upon subjective notions of fairness bears a heavy burden. We disclaim any intention to appeal merely to what some may think "to be fairer or wiser or to give a surer promise of protection to the prisoner at bar." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). Nor even do we rely on "the traditional jurisprudential attitudes of our legal sys-

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[7] *Malloy v. Hogan*, 378 U.S. 1 (1964); *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964).

[8] In some jurisdictions, including Florida, the defendant's own testimony would not be excluded for failure to give the required notice but only that of other witnesses. See note 17, infra.

tem" which the dissenters in *Spencer* thought invalidated the Texas recidivist procedure upheld in that case. 385 U.S. at 570. In our view, the case against Florida's alibi statute and its counterparts in other jurisdictions is premised on specific and well-established constitutional guarantees. Thus this case need not be an occasion for reopening the always fascinating debate between those who believe that this Court's jurisdiction over state criminal procedures is limited "to specific Bill of Rights' protections" *(Duncan v. Louisiana,* 391 U.S. 145, 171 (Black, J., concurring)) and those who conceive a limited jurisdiction under the Due Process Clause for the protection of substantive "personal rights that are fundamental" *(Griswold v. Connecticut,* 381 U.S. 479, 486 (1965) (concurring opinion)) or to deal with assertedly unfair criminal procedures "fundamentally at odds with traditional notions of due process . . . [which] needlessly [prejudice] the accused without advancing any legitimate interest of the State." *Spencer v. Texas,* supra, at 570 (dissenting opinion). Whatever one's conception of the reach of the Due Process Clause in such matters, alibi statutes such as Florida's cannot stand, for they violate specific, established constitutional guarantees. We turn to an analysis of that infringment.

I

THE DEFENDANT CANNOT, CONSISTENTLY WITH THE FIFTH AND FOURTEENTH AMENDMENTS, CONSTITUTIONALLY BE COMPELLED TO DISCLOSE TO THE PROSECUTION, IN ADVANCE OF TRIAL, INFORMATION RESPECTING THE NATURE OF THE DEFENSE HE WILL OR MAY ASSERT

This Court has had frequent occasion to recall that ours is an accusatorial system and that, unlike the systems of some other countries, the defendant in a criminal case need do nothing whatever which might in any way lead to his conviction. The prosecution must "shoulder the entire load" (8 WIGMORE, EVIDENCE 317 (McNaughton rev. 1961), quoted in *Miranda v. Arizona*, 384 U.S. 436, 460 (1966)); the defendant may not be made, in Hawkins' oft-quoted phrase, "the deluded instrument of his own conviction". 2 Hawkins, PLEAS OF THE CROWN 595 (8th ed. 1824). Its origins may be complex and imperfectly understood; but the Fifth Amendment, now fully applicable to state proceedings,[9] clearly reflects not only *values* fundamental to our system of criminal law but also the very *structure* of that system. The prosecution bears the burden of independent investigation, of going forward, and of proving the defendant's guilt beyond a reasonable doubt (*Morrison v. California*, 291 U.S. 82 (1934); *Leland v. Oregon*, 343 U.S. 790, 805-6 (1952) (Frankfurter, J., joined by Black, J., dissenting); *cf. Speiser v. Randall*, 357 U.S. 513, 526 (1958) ("Due process

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[9]See authorities cited note 7 supra; see also *Gardner v. Broderick*, 392 U.S. 273 (1968); *Spevack v. Klein*, 385 U.S. 511 (1967); *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Stevens v. Marks*, 383 U.S. 234 (1966); *Griffin v. California*, 380 U.S. 609 (1965); *Anderson v. Nelson*, 390 U.S. 523 (1968) (per curiam).

commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the fact-finder of his guilt.")), unassisted by any irrational presumptions (see *Tot v. United States*, 319 U.S. 463 (1943); *United States v. Romano*, 382 U.S. 136 (1965); *Leary v. United States*, 395 U.S. 6 (1969); compare *United States v. Gainey*, 380 U.S. 63 (1965). The defendant bears no duty to prove his innocence. *Cf. Garner v. Louisiana*, 368 U.S. 157 (1951); *Thompson v. City of Louisville*, 362 U.S. 199 (1960). The defendant may not be compelled to testify; indeed, he may not even be called by the prosecution to the witness stand and asked whether he wishes to testify.[10]

This structure, and the allocation of burdens which it reflects, is fundamental to our jurisprudence. Here basic principles of Due Process (see *Watts v. Indiana*, 338 U.S. 49, 54-55 (1949) (plurality opinion); *Culombe v. Connecticut*, 367 U.S. 568, 581-83 (1961) (plurality opinion); *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961) have become "assimilated" (*Culombe v. Connecticut*, supra, at 583, n. 25) with the Fifth Amendment privilege against self-incrimination. See *Malloy v. Hogan*, 378 U.S. 1 (1964). Consistently these cases reflect

> "recognition that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its

[10] VIII WIGMORE, EVIDENCE § 2268, pp. 406-08 and n. 6 (McNaughton rev. 1961); *Cephus v. United States*, 324 F.2d 893 (D.C.Cir. 1963); *United States v. Housing Foundation of America*, 176 F.2d 665 (3d Cir. 1949); *People v. Talle*, 111 Cal.App.2d 650 (1952).

> essential mainstay. . . . Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth." (*Malloy v. Hogan,* supra, at 7-8).

The requirement that a defendant give notice to the prosecution of his intention to assert an alibi defense flies in the teeth of these principles. It compels him to become an unwilling aide to the prosecution, providing it with information which may assist in his conviction. The prosecution, at the point in the proceedings when the defendant is required to give notice of an alibi defense, has progressed far beyond merely having "focused" on the accused (*cf. Escobedo v. Illinois,* 378 U.S. 478, 491 (1964)); the defendant is the target of a determined, adversary deployment of the state's substantial resources in an effort to convict and imprison him. That complex of values safeguarded by the Fifth Amendment is infringed when he can be required to offer the slightest assistance to his adversary.

Moreover, disclosure of a potential alibi defense prior to trial forces the defendant to decide what he has not previously been required to decide until *after* the prosecution has been put to its proof: whether he will stand mute, exercising his constitutional right of silence, or whether he will present evidence—and, possibly, personally testify—by way of defense.

The principal argument for pretrial notice rests on the assertion that the defendant is in no way forced

to waive his constitutional right to remain silent in the face of charges against him, but is only required to accelerate the timing of that decision. But in our view of the adversary process enshrined in the Fifth and Fourteenth Amendments, it is precisely the defendant's *right* to defer that decision until after he has heard the State's case against him.[11] While he may ultimately elect to offer evidence and testify, the prosecution cannot compel him to do so, or accelerate the timing of his decision as, for example, by calling him to the witness stand. See authorities cited in note 10, supra. To advance the time at which the defendant must decide whether to raise an alibi defense violates this principle.

The violation of constitutional principles is anything but theoretical; it can work a considerable unfairness. The defendant may wish to avoid reliance on the alibi defense, if possible;[12] but often it will

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[11]That right, as we view it, is a component of the Fifth Amendment privilege against self-incrimination, though obviously it might equally be viewed as a basic principle of procedural due process. Note, 76 HARV. L. REV. 838, 840 (1963). As Mr. Justice Frankfurter noted in *Culombe v. Connecticut*, supra, Due Process principles and the privilege have, in this area, become "assimilated." See pp. 12-13, supra.

[12]In this respect, the present case differs from the question which is presented by general pretrial discovery against the defendant in a criminal case which is allowed as the price for granting the defendant discovery against the prosecution. *See, e.g.*, FED. R.CRIM.PRO. 16(c). While the constitutionality of that practice is by no means beyond dispute (*see, e.g.*, Statement of Mr. Justice Douglas, dissenting from the transmittal of the 1966 amendments to the Federal Rules of Criminal Procedure, 39 F.R.D. 272 (1966), it can arguably be defended on the ground that the defendant, by obtaining discovery against the prosecution, can at least determine in advance of trial the nature of the case against him and is thus in a position to make the kinds of decisions he

only *after* the prosecution has closed its case be in a position to judge whether he must run the risks which that defense entails.[13] But compliance with the alibi statute may well compel the defense to put in its alibi evidence even though, after consideration of the prosecution's case, it would prefer not to do so. This follows even though the statute itself does not in terms *require* the defense to introduce the alibi evidence which was the subject of its notice to the prosecution,

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otherwise could only make after hearing the prosecution's case-in-chief at trial.

It is somewhat ironic that one of the principal arguments frequently heard against allowing discovery against the prosecution in a criminal case—fear that the prosecution's witnesses will be harassed—has not caused comparable pause among the proponents of alibi-notice statutes. Yet there is ample reason for concern. Notice to the prosecution of an intention to rely on an alibi defense will predictably result in the questioning by the prosecutor (or by police officers acting under his direction) of the witnesses specified by the defendant as those he intends to call. Even restrained questioning by the prosecutor or his agents may frequently have a coercive impact upon the sorts of individuals of modest background who so frequently will be the basis of an alibi defense. It was precisely this concern that persuaded the California Bar Association to oppose an alibi-notice proposal (see note 19 infra) "on the ground that [this] would cause the harassment and intimidation of alibi witnesses by public officers." (36 CAL STATE B. J. 480, 487. (1961).

[13]The nature of those risks will, of course, vary from case to case. For example, (1) the witnesses on which the defendant would have to rely might be weak or particularly vulnerable to impeachment by proof of prior felony convictions; (2) establishment of the alibi might require testimony by the defendant himself, and thus a waiver of his privilege with the resulting subjection to impeachment through evidence of prior felony convictions; (3) the alibi might itself require the admission of another—uncharged—crime, or (in the case of a defendant on parole or probation) admission of conduct constituting violation of conditions of parole or probation; or (4) the alibi, though meritorious, may because of the nature of the evidence available to the defendant be potentially unbelievable; a cautious lawyer may be reluctant to present to the trier of fact evidence it is not likely to accept, with the resultant destruction of the credibility of the entire defense.

for it will often be the case that the prosecution, in presenting its opening statement or case-in-chief, will have anticipated the defense in some manner which will as a practical matter compel the defense to follow through with the alibi defense lest the jury draw an unfavorable inference from its failure to do so.

Even if the potential prejudice to the defendant were considerably less apparent, this alibi-notice procedure would be cause for grave concern. As the Court said in a similar context of the need for vigilance where Fifth Amendment interests are concerned, "illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure." *Boyd v. United States,* 116 U.S. 616, 635 (1886).

But for the reasons already mentioned, the prejudice is substantial. As a consequence of some of those considerations, a defendant considering reliance upon evidence establishing an alibi may feel compelled to forego that defense rather than give advance notice to the prosecution in compliance with the statute. Failure to do so in nearly all of the states having alibi rules will, however, prevent the defendant from changing his mind once the prosecution has rested; he is forever barred from introducing evidence—often including, as we have earlier noted, his own personal testimony—of an alibi. Similarly, fear of that terrible sanction may compel such a defendant to give notice of the alibi before he is in fact in a position to decide intelligently whether to make that decision. That obviously was the

case here. For that reason, we must now turn to an examination of the constitutionality of that sanction.

II

THE DEFENDANT MAY NOT CONSTITUTIONALLY BE DENIED THE OPPORTUNITY TO OFFER EVIDENCE, BY HIS OWN TESTIMONY ON OTHER WITNESSES, TENDING TO ESTABLISH HIS INNOCENCE, AS A PENALTY FOR NONCOMPLIANCE WITH A NOTICE REQUIREMENT

Even assuming what we do not concede, namely, that the State may constitutionally require a defendant to give the prosecution prior notice of his intention to offer an alibi defense along with the names and addresses of the witnesses he intends to call—this Florida procedure could not stand. For Florida, as do most (though not all)[14] of the States having alibi statutes, enforces that procedural requirement by denying defendants their right to present evidence of an alibi defense as to which they were required but failed to give notice. Our submission, stated simply, is that a defendant in a criminal case has no more fundamental constitutional right than the right to offer evidence—and testify, if he wishes—on the issues which the applicable law makes relevant in the case. This right the State may not abridge—indeed, wholly deny—for merely failing to comply with a procedural requirement whose benefits are, at the least, minimal and which in any event can be fully vindicated by means far less subversive of the defendant's Due Process rights.

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[14]See infra note 22 and accompanying text.

The right to be heard in defense against criminal charges is anything but an exotic constitutional creation at the penumbra of contemporary jurisprudence. To the contrary, it is so fundamental that few would dispute its constitutional stature; a literally unbroken stream of decisions of this Court (paralleled, of course, by decisions of courts throughout this country) have affirmed that, at a minimum, Due Process requires that a defendant in a criminal case "be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own." *Specht v. Patterson,* 386 U.S. 605, 610 (1967); see also *In re Oliver,* 333 U.S. 257, 273-77 (1948) ("due process of law . . . requires that [the defendant] . . . have a reasonable opportunity to meet [the charges] by way of defense or explanation . . . and call witnesses in his behalf, either by way of defense or explanation"); *Oyler v. Boles,* 368 U.S. 448 (1962); *In re Gault,* 387 U.S. 1 (1967). The recent decisions of this Court specifically applying the various Sixth Amendment protections to State criminal proceedings add emphasis to the constitutional stature of the right to offer defensive evidence. They establish that the accused cannot be deprived of the opportunity to cross-examine the witnesses against him[15] and, more importantly for present purposes, neither may he be denied the right to compulsory process for obtaining witnesses whose testimony might be favorable. *Wash-*

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[15] *Pointer v. Texas,* 380 U.S. 400 (1965); *Douglas v. Alabama,* 380 U.S. 415 (1965); *Barber v. Page,* 390 U.S. 719 (1968).

ington v. Texas, 388 U.S. 14 (1967). Similarly, the defendant's right to effectively defend against the charges against him, and to offer evidence of his innocence, may not be indirectly infringed by an unreasonable denial of a continuance. *Ungar v. Sarafite,* 376 U.S. 575, 589 (1964).

One need only contrast these uncontradicted explications of a fundamental constitutional principle with the typical application of an alibi rule of the sort which Florida has adopted to perceive the grave constitutional difficulties presented by such a procedure. The case of *amicus* is instructive. Charged with participation in an armed robbery perpetrated by several individuals, he took the stand to testify that he was elsewhere—in a poolroom to be specific—at the time of the alleged offense. That testimony was of the gravest importance; if believed by the jury, it would have compelled his acquittal. His counsel, for reasons never disclosed on the record, had not given notice of the possible defense of alibi as Kansas law requires, and *amicus'* testimony was interrupted by an objection of the prosecutor, which was sustained. The defendant's testimony was thus abruptly terminated, and the jury instructed that it must disregard the defendant's protestations that he was elsewhere at the time the alleged offense occurred.[16] Thus in *amicus'* case, the denial of elementary due process was compounded by the trial court's order barring *the defendant himself* from testifying as to facts

[16] An excerpt from the trial transcript of *amicus* containing this portion of the trial is attached hereto as Appendix "A".

which would establish his innocence. *Cf. Ferguson v. Georgia,* 365 U.S. 570 (1961).[17]

We doubt that any justification exists for the outright denial of the right to offer evidence—indeed, to testify personally—at the trial on an issue which is not only relevant under the applicable law but is in fact potentially dispositive of the outcome of the case. But even if we were to accept that this most fundamental right might be weighed against some overriding, compelling state interest, no such countervailing considerations are present to justify the application of so sweeping a denial of constitutional rights for mere non-compliance with a technical requirement of notice.

The purpose which alibi statutes or rules such as the one before the Court are intended to serve—avoidance of surprise and perjurious testimony—is unobjectionable (although there is, for the reasons stated in Part I, supra, considerable doubt as to the State's constitutional power to achieve that goal by compelling the accused to give notice to it prior to trial). Most of these provisions stem from proposals made a number of years ago (see Epstein, *Advance Notice of Alibi,* 55 J. CRIM. L.C. & P.S. 29-31 (1964)), at a time when the federal Constitution had not been thought to impose much restraint upon state

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[17]Some states, including Florida, would not bar the defendant from testifying even though no notice was given, but would bar other witnesses. E.g., FLA.R. CRIM. PRO. 1.200; *State v. Stump,* ..... Iowa ....., 119 N.W. 2d 210 (1963); *State v. Thayer,* 124 Ohio St. 1, 176 N.E. 656 (1931); *People v. Rakiec,* 260 App. Div. 452, 23 N.Y.S. 2d 607 (1940). Kansas is not so generous.

criminal proceedings. The proponents of the alibi-notice procedure contended that the cause of justice would be well served by requiring the accused to give advance notice to the prosecution of its intention to raise an alibi defense; the prosecution might then have an adequate opportunity to investigate the facts of the defense and develop evidence of its own which might disprove it. *E.g., State v. Thayer,* supra; Millar, *The Modernization of Criminal Procedure,* J. CRIM. L. 344, 350 (1920). Some doubt has been expressed as to the necessity and efficacy of the notice requirement,[18] and barely more than a quarter of the States have adopted it;[19] further, as will be seen, not all of them routinely deny the accused his right to offer evidence of a critical defense as the penalty for noncompliance, but rather attempt to enforce that policy of disclosure by other means. See note 22, infra, and accompanying text.

With the merits of and the necessity for the alibi-notice procedure supported by somewhat less than overwhelming evidence, it is appropriate to consider

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[18]*See, e.g.,* Note, *Is Specific Notice of the Defense of Alibi Desirable?* 18 TEX.L.REV. 151 (1946).

[19]Proposals for an alibi-notice requirement have recently been made but not accepted in California (see Calif. Law Rev. Comm., RECOMMENDATION AND STUDY RELATING TO NOTICE OF ALIBI IN CRIMINAL ACTIONS (1960)) and in the federal criminal system (see Proposed Rule 12A, FED.R.CRIM.PRO., 1962 Draft, 31 F.R.D. 673 (1963)); that was the second occasion on which an alibi-notice requirement was rejected for the federal criminal system, as this Court in 1944 struck two alternate alibi provisions from the then proposed Federal Rules of Criminal Procedure. Epstein, *Advance Notice of Alibi,* 55 J. Crim. L.C. & P.S. 29, 30 (1964). See FED.R. CRIM.PRO. 12 (2d Preliminary Draft 1944).

whether these limited advantages might adequately be secured without depriving the defendant of his constitutional right to be heard and to offer evidence tending to establish his innocence. *E.g., United States v. Jackson,* 390 U.S. 570, 582-83 (1968); *United States v. Robel,* 389 U.S. 258, 268 (1967); *Dean Milk Co. v. City of Madison,* 340 U.S. 349, 354-56 (1951); see generally Wormuth and Mirkin, *The Doctrine of the Reasonable Alternative,* 9 UTAH L. REV. 254 (1964). Such an examination, we submit, convincingly demonstrates that the goal of preventing unjustifiable acquittals because of the prosecution's inability to disprove perjurious alibi defenses can adequately be protected by means far less destructive of cherished constitutional guarantees.[20] We consider some of them briefly:

(1) The trial court might punish the wilful disregard of an applicable rule of procedure by contempt —of either the accused, his counsel, or both. This assumes, of course, that the prosecution has a right to such notice, an assumption which is disputed in Part I, supra. But if the requirement of notice is constitutional, then neither the defendant nor his counsel should be immune from the imposition of

[20]Some of these alternatives would assist in encouraging the defense to give prior notice of an intended alibi defense; thus their constitutionality turns on whether the defendant can be *compelled* to give any such notice. See Part I, supra. As noted, there are grave constitutional doubts as to the constitutionality of that requirement, and some of the alternatives which we are about to consider *(e.g.,* continuing the trial) suggest that, if the Fifth Amendment question also turns on the availability of a less onerous alternative, such an alternative would not be difficult to find.

sanctions in the manner by which courts have traditionally protected their substantial interest in orderly procedure.

(2) The trial court might, where the prosecution has been surprised by the unannounced raising of an alibi defense, continue the trial for a reasonable period to allow the prosecution to make whatever investigation might be necessary to enable it to meet the defense.[21] In at least one state,[22] the trial court is empowered to continue the trial where an alibi defense is raised without prior notice, but does not have the power to exclude evidence of alibi. It is difficult to conceive of a situation in which the legitimate interests of the prosecution would not fully be pro-

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[21]The right of speedy trial, now a constitutional protection applicable to state criminal proceedings (*Klopfer v. North Carolina*, 386 U.S. 213 (1967); *Smith v. Hooey*, 393 U.S. 374 (1969)), would in no way be offended by a brief continuance for this purpose. The Sixth Amendment protects only against "undue and oppressive" delays (*United States v. Ewell*, 383 U.S. 116, 120 (1966)), and not against those which are justifiable and reasonable. *See, e.g., Harrison v. United States*, 392 U.S. 219 (1968). There could be no reasonable basis for complaint where the defendant's own failure to comply with the statute or rule requiring notice was the occasion for granting a continuance.

[22]See OKLA. STAT., Tit. 22, §585 (1961). Iowa has a similar statute, but there is judicial authority allowing exclusion of the alibi evidence. See *State v. Rourick*, 245 Iowa 319, 60 N.W.2d 529 (1953). Most states, but apparently not Kansas, at the least allow the trial judge discretion to allow the evidence and protect the interests of the prosecution by other means such as continuance. See Note, 15 STAN. L. REV. 700, 701 & n. 7 (1963). Moreover, there is some evidence that even in those states which by statute absolutely bar alibi evidence where notice should have been but was not given, trial judges ameliorate the harshness of that provision by ignoring it. See Note, *Is Specific Notice of the Defense of Alibi Desirable?*, 18 TEX. L. REV. 151, 156 (1940); see Epstein, *Advance Notice of Alibi*, supra, at 36.

tected by a continuance, the granting of which might even be made mandatory lest there be any doubt as to the willingness of trial judges to grant continuances in the circumstances.

(3) Should the defendant fail to give the required notice (and, again, assuming that the requirement is constitutional), that violation might be a proper basis for declaring a mistrial in circumstances (which, presumably, would be exceedingly rare) in which simply ordering a continuance would not be adequate to protect the legitimate interests of the prosecution.[23]

(4) The prosecutor might be allowed to argue to the jury where the facts warrant, that the surprise assertion of an alibi defense (in violation of the requirement that he give advance notice) prejudiced the State's ability to deal with that defense and, moreover, must be viewed critically in view of the circum-

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[23]While the ordering of a mistrial could in theory give rise to a claim that a retrial would constitute jeopardy in violation of the Fifth Amendment *(Benton v. Maryland,* 395 U.S. 784 (1969)), such a contention would seem ill founded. See *Gori v. United States,* 367 U.S. 364 (1961). Such a case would not involve any of the factors which might render a retrial following a mistrial as a violation of the double jeopardy clause, such as a mistrial ordered because of wrongful conduct on behalf of the prosecution or where the purpose of the trial judge was to "help the prosecution, at a trial in which its case is going badly, by affording it another, more favorable opportunity to convict the accused." *(Id.,* at 905). To the contrary, our hypothetical mistrial would be the response to the defendant's failure to comply with the requirement that he give advance notice of an alibi defense, in the rare case where no other remedy would suffice. Particularly when viewed as an alternative to the far harsher procedure presently practiced—exclusion of the defendant's alibi evidence altogether—such an order should not be deemed a denial of due process. In any event, it would be a highly unusual case in which the other alternatives discussed above would not fully protect the interests of the prosecution.

stances.[24] Similarly, an instruction to that effect from the trial judge might be in order.

The foregoing alternatives—which may well be considerably short of exhaustive—would, singly or in combination, provide full protection for the legitimate interests of the prosecution which are said to be the basis for the alibi-notice requirement. There is, plainly and simply, no possible justification for a sanction which wholly denies the opportunity to be heard on a vital aspect of his defense. The alibi-notice provisions of Florida and Kansas—and the other jurisdictions which similarly deny the defendant the right to be heard—are fundamentally arbitrary, viciously choking off the defense as a penalty for what is at most a procedural omission.

The unfairness of that approach is particularly apparent when viewed against the background of the realities of criminal law administration in this country. A substantial number of defendants in criminal cases are indigent or nearly so. They may be represented by court appointed counsel, a Public Defender, or one of the attorneys whose office is the local criminal court and whose practice is operated, as the recent Presidential Crime Commission's Task Force on the Administration of Justice phrased it, on "a mass production basis." TASK FORCE REPORT: THE COURTS 32 (1967). Frequently, counsel will have had little or no opportunity to study the case much in advance of trial;

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[24] Such a comment would not violate the rule of *Griffin v. California*, 380 U.S. 609 (1965) if, contrary to the argument of Part I, supra, the alibi-notice requirement is not held to violate the Fifth and Fourteenth Amendments.

it is not uncommon for client and counsel to meet just before the trial.[25] Inadvertance or the errors of counsel may account for a substantial proportion of the instances in which the required notice is not given and the alibi defense thereby lost forever; but it is the defendant, not his lawyer, who must pay the price. *Compare Fay v. Noia,* 372 U.S. 391, 439 (1963). Thus a penalty—the loss of the right to present an alibi defense—which would be unfair even as to a defendant who deliberately concealed his intention to present an alibi defense is also indiscriminately applied to the non-wilful defendant who, perhaps through the blunders of counsel or due to his late entry into the case, fails to give the required notice.[26]

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[25] *See, e.g.,* Oaks and Lehman, *The Criminal Process of Cook County* and *The Indigent Defendant,* 1966, UNIV. OF ILL. L. FORUM, 584, 693 (1966); THE CHALLENGE OF CRIME IN A FREE SOCIETY, 128-29 (1967):

> In many lower courts defense counsel do not regularly appear, and counsel is either not provided to a defendant who has no funds; or, if counsel is appointed, he is not compensated. The Commission has seen, in the "bullpens" where lower court defendants often await trial, defense attorneys demanding from a potential client the loose change in his pockets or the watch on his wrist as a condition of representing him. Attorneys of this kind operate on a mass production basis, relying on pleas of guilty to dispose of their caseload. They tend to be unprepared and to make little effort to protect their clients' interests.

[26] This case involves the baldest of infringements of the right of an accused to be heard and to present evidence. Recognition of the unconstitutionality of that infringement surely does not imply that a federal question would be presented by the even-handed application of traditional rules of evidence as to admissibility, any more than the application of the Sixth Amendment right of confrontation to state criminal proceedings (see authorities cited note 15, supra) has superseded state hearsay rules with a federal evidence code (*cf. United States v. Augenblick,* 393 U.S. 348, 355-56 (1969)), or the right to compulsory service of process supersedes "nonarbitrary state rules" regarding the capacity of a witness to testify. *Washington v. Texas,* 388 U.S. 14, 23 n.21; see also *id.,* at 24-25 (Harlan, J., concurring).

CONCLUSION

For the reasons stated in Part I of this brief, the prosecution is not entitled to the assistance of the defense in the preparation of its case for trial, and may not require him to give notice of and information about the intended defense. The defendant has a constitutional right to defer its decision as to reliance upon an alibi defense until *after* he has heard the prosecution's case against him.

Moreover, even if the defendant can constitutionally be compelled to give such notice, he may not be deprived of his constitutional right to be heard and to present relevant evidence tending to establish his innocence for mere non-compliance with the notice requirement; the prosecution's legitimate interests may adequately be protected by means far less subversive of the defendant's rights.

For these reasons, the conviction of the petitioner should be reversed.

Dated: January 20, 1970.

Respectfully submitted,

JACK GREENBERG,
MICHAEL MELTSNER,
JEROME B. FALK, JR.
Attorneys for Amicus Curiae,
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(Appendix "A" Follows)

Appendix "A"

EXCERPT FROM THE TRIAL TRANSCRIPT OF THE STATE OF KANSAS VS. THOMAS KELLY AND VIRGIL JENKINS, CASE NO. CR 4276-67, DISTRICT COURT OF SEDGWICK COUNTY, KANSAS, DIVISION SIX, OCTOBER 30, 1967, pp. 155-161:

The Court: The defendant, Mr. Jenkins, has indicated that he would like to testify in his own behalf.

The Court: All right, bring the jury in, Mr. Knott.

The Bailiff: Jury is all present and accounted for, Your Honor.

The Court: Very well, Mr. Knott. Do you wish to make an announcement, Mr. Hayes?

Mr. Hayes: Yes, Your Honor, the defense moves to reopen its case and would like to present evidence to the court and jury.

The Court: Very well. Do you have any objection, Mr. Focht?

Mr. Focht: No, Your Honor.

The Court: Very well, the case will be reopened.

Before proceeding, Mr. Hayes, I wish to advise the jury that the State of Kansas and the defendants have entered into the following stipulation: That on the night in question, July 26, July 25th, 1967, the 1965 Mustang in question was titled in the name of Burney Henderson Smith, that at the time the automobile was stopped on July 26, 1967, the driver of the automobile was Burney Henderson Smith.

Your witness, Mr. Hayes.

Mr. Hayes: The defense will call Mr. Jenkins.

The Court: Very well. Mr. Jenkins, will you come forward, sir?

VIRGIL JENKINS

called as a witness on his own behalf, after having first been duly sworn, testifies as follows:

Direct Examination

by Mr. Hayes:

Q. State your name and address for the court, please?

A. Virgil Jenkins.

Q. And where were you residing on the 25th of July, 1967?

A. 3212 Olive, Kansas City, Missouri.

Q. Now, did you on about the 26th of July, 1967, come to the City of Wichita?

A. Yes.

Q. And what mode of transportation did you come?

A. '65——

The Court: Excuse me, gentlemen. I would like to have counsel approach the Bench, please. Have you advised Mr. Jenkins that he doesn't have to testify?

Mr. Hayes: I'll do so in my examination. Of course, he knows; I have talked to him about it.

The Court: Well, let's do it in your examination.

Q. (By Mr. Hayes) You understand, sir, you don't have to testify in your own behalf?

A. Yes.

Q. You understand that. You could invoke the Fifth Amendment and thereby exempt yourself from any testimony in this case?

A. Yes, sir.

Q. Is it your desire to freely—is it your free and voluntary desire to testify in this case in your own behalf?

A. Yes.

Q. And do you understand that by doing so you waive the Federal immunity?

A. Yes.

Q. And subject yourself to——

A. Yes.

Q. ——questions?

The Court: You understand also, Mr. Jenkins, that anything you say will be, can and will be used against you?

A. Yes.

The Court: All right.

Q. (By Mr. Hayes) Do you also understand, Mr. Jenkins, that anything you say may be held against you or for you? I appreciate that.

A. Yes.

Q. All right. What mode of operation was used to come to the City of Wichita?

A. 1965 Mustang.

Q. Now, would you tell the court in your own words what happened after you arrived in the City of Wichita?

A. Well, we got here about 9, about 9 o'clock because we had car trouble. There were four of us at the time, Burney Smith, Thomas Kelly, a guy named McGee, and myself. We were supposed to come down. Smith, he had some kin down here. Well, my folks stayed here, and I wasn't working down here, and

Mr. Kelly decided to come down with us, so we rode around for a while and started to drinking. Me and Kelly got out on—there is a pool hall between Wabash and Ohio, on Murdock.

Q. Huh-uh.

A. We got out down there about, I guess about 12 o'clock, which they have a house in the back that is open all the time. They play records, and——

Q. Yes.

A. So Smitty and this other guy left, and I don't know, it was about something to three when he come back to pick us up. When he come back he was by his-self, so we got in the car, and we were supposed to be going to Oklahoma when we left Wichita, and when we got out on Kellogg on Bluff, that is when we got stopped.

Q. I see. All right, you have been in court and heard the testimony of the police officers who appeard?

A. Yes.

Q. And were you stopped substantially as they have testified to?

A. Yes.

Q. Then you're stating that between the hours of 2 and 3 o'clock, or after 3 o'clock you were on Murdock Street?

A. No, between 12. We got out down there about 12 o'clock.

Q. All right.

A. Until he come back, picked us up it was something to 3:00.

Q. But you were in the vicinity of Murdock and Wabash?

A. Ohio, the place is between Ohio and Wabash.

Q. Yes, I know where it is.

A. Yes.

Mr. Focht: Your Honor, I object to that reality and move that all be stricken. That is alibi with no notice of alibi having been given, and under the case of *State v. Rider* alibi testimony from a defendant it must be given. The state has to be given at least ten day's notice.

Mr. Hayes: May it please the Court, it's also the law of Kansas that evidence which is subject to be objected to must be objected to at the time that evidence is given, and that a motion to strike testimony that has been given to which there has been no objection comes too late, and——

Mr. Focht: You cannot know it's going to be alibi until you hear it.

Mr. Hayes: Actually, there should be no objection to the jury knowing what the facts are. I can't see what the state would object to.

Mr. Focht: Your Honor, the purpose of the alibi statute is to give the State of Kansas a chance to check it. If a person intends to offer evidence that they were at some other place at some other time, then they must follow the statutes. In the case of *State v. Gene Austin Rider* in the Supreme Court this court held that that included the defendant, and if he is going to offer testimony he was some place else at another time, he must serve notice on the state so that the alibi can be checked, and that has not been done. I ask the testimony all be stricken and the jury asked to disregard it.

Mr. Hayes: May it please the Court, it is also the law in the Supreme Court, *Bradey v. Maryland* [sic], that the purpose of a trial is to find out what happened and that procedural technicalities are to be waived in lieu of constitutional rights, and, therefore, if there is a conflict between procedural rights and the basic constitutional rights, his constitutional rights take precedence, and that procedure technicalities should not be adhered to to the deprivation of a person whose life is in jeopardy.

The Court: Ladies and Gentlemen of the Jury, you are advised that the testimony of Virgil Jenkins is stricken from the record and you are advised to disregard it.

Is there anything further, Mr. Hayes? Do you have any further questions, Mr. Hayes?

Mr. Hayes: I'm just——by virtue of the court's statement I'm just thinking.

The Court: I'm going to excuse the jury.

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in the
Supreme Court
of the
United States

October Term, 1969

No. 927

JOHNNY WILLIAMS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

On Writ of Certiorari to the District Court of Appeal, Third District of Florida

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the District Court of Appeal of Florida, Third District. Williams v. State of Florida is reported at 224 So.2d 406 (Fla. 3rd D.C.A. 1969) App. 93.

JURISDICTION

Jurisdiction is conferred upon this Court by 28 U.S.C. Section 1257 (3) on the premises that the State statute of Florida 913.10(1) (1967) is repugnant to a right and privilege claimed under the Constitution of the United States. This Court granted Certiorari on December 8, 1969. App. 95)

QUESTIONS PRESENTED

ARE THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE AND THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION VIOLATED BY A STATE REQUIREMENT THAT A DEFENDANT DISCLOSE, TEN DAYS IN ADVANCE OF TRIAL, HIS ALIBI DEFENSES?

DO THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE AND THE SIXTH AMENDMENT ENTITLE A STATE DEFENDANT TO A TRIAL BY A TWELVE-MAN JURY IN A NON-CAPITAL CASE?

STATUTES INVOLVED

Florida's Rule of Criminal Procedure 1.200:

"Upon the written demand of the prosecuting attorney, specifying as particularly as is known to such prosecuting attorney, the place, date and

time of the commission of the crime charged, a defendant in a criminal case who intends to offer evidence of an alibi in his defense shall, not less than ten days before trial or such other time as the court may direct, file and serve upon such prosecuting attorney a notice in writing of his intention to claim such alibi, which notice shall contain specific information as to the place at which the defendant claims to have been at the time of the alleged offense and, as particularly as is known to defendant or his attorney, the names and addresses of the witnesses by whom he proposes to establish such alibi. Not less than five days after receipt of defendant's witness list, or such other times as the court may direct, the prosecuting attorney shall file and serve upon the defendant the names and addresses (as particularly as are known to the prosecuting attorney) of the witnesses the State proposes to offer in rebuttal to discredit the defendant's alibi at the trial of the cause. Both the defendant and the prosecuting attorney shall be under a continuing duty to promptly disclose the names and addresses of additional witnesses which come to the attention of either party subsequent to filing their respective witness lists as provided in this rule. If a defendant fails to file and serve a copy of such notice as herein required, the court may exclude evidence offered by such defendant for the purpose of proving an alibi, except the testimony of the defendant himself. If such notice is given by a defendant, the court may exclude the testimony of any witness offered by the defendant for the purpose of proving an alibi if the name

and address of such witness as particularly as is known to defendant or his attorney is not stated in such notice. If the prosecuting attorney fails to file and serve a copy on the defendant of a list of witnesses as herein provided, the court may exclude evidence offered by the state in rebuttal to the defendant's alibi evidence. If such notice is given by the prosecuting attorney, the court may exclude the testimony of any witness offered by the prosecuting attorney for the purpose of rebutting the defense of alibi if the name and address of such witness as particularly as is known to the prosecuting attorney is not stated in such notice. For good cause shown the court may waive the requirements of this rule."

Florida Statutes, Section 913.10(1) (1967)

"(1) Twelve men shall constitute a jury to try all capital cases, and six men shall constitute a jury to try all other criminal cases."

STATEMENT

The petitioner in this cause was the defendant in the trial court. The respondent, the State of Florida, was the prosecution. For purposes of clarity, the parties will be referred to as they stand in this Court.

The petitioner was charged by Information with the crime of robbery in violation of Florida Statutes, Section 813.011 on March 20, 1968. (App. 1-2)[1] Prior to trial on

[1] "App." references are to the separate appendix filed pursuant to Rule 36. The appendices in this Brief will be cited as "Appendix A", etc.

July 3, 1968, the petitioner filed defensive motions, among these was a motion to impanel Twelve Man Jury. (App. 3, 9, 87) Said motion was denied (App. 4, 8, 9, 88) Petitioner then filed a Motion for a Protective Order (App. 5) alleging that Florida Rule of Criminal Procedure Rule 1.200 (Notice of Alibi) (Appendix A) violates the Fifth and Fourteenth Amendment of the United States Constitution in that it "compels the defendant in criminal case to be a witness against himself."

The Motion for a Protective Order was denied (App. 6) and the petitioner complied with the demand, the alleged alibi witness was summoned to the office of the State Attorney and gave testimony prior to trial. (App. 58) The State Attorney complied with the provisions of Rule 1.200 by supplying the date, place, and time the alleged crime occurred. (App. 7) The petitioner was convicted and sentenced to life imprisonment. (App. 86) Motion for new trial was timely filed (App. 87) and denied. (App. 88)

The petitioner appealed to the District Court of Appeal, Third District. (App. 88) The District Court of Appeal, affirmed the conviction, holding that Florida Rule of Criminal Procedure 1.200 did not violate one's privilege against self incrimination and additionally that his constitutional rights were not violated when the trial court denied his request for a trial by a jury of twelve instead of six. (App. 94) The court cited as authority, *Duncan v. Louisiana*, 391 U.S. 145 (1968). See also *Williams v. State*, 224 So.2d 406 (Fla. 3rd D.C.A. 1969).

A petition for Writ of Certiorari was filed in this Honorable Court, to which the State of Florida responded. This Court granted Certiorari on December 8, 1969. (App. 95)

SUMMARY

The provisions of Florida Rule of Criminal Procedure 1.200 is not a rule of substantive law and therefore does not violate a defendant's right against self-incrimination. There is nothing which compels a defendant to incriminate himself nor is there anything which compels him to give any information to the prosecution, unless he voluntarily and for his own benefit intends to use an alibi defense. *People v. Rakiec*, 289 N.Y. 306, 45 N.E.2d 812 (Ct. of App. 1942) which affirmed 260 App. Div. 949, 23 N.Y.S.2d 607 (Sup. Ct. 1940).

The purpose of the Notice of Alibi Rule is to prevent surprise and to aid with the orderly administration of Criminal Justice. Time and money are saved since if the prosecutor is satisfied after his investigation that the alibi is true, the case may be dismissed or the information nolle prossed. Moreover, no continuance is necessary to determine the validity of the alibi or to make further preparation. If the investigation indicates that the alibi is false or that the defendant's witnesses are not credible, the prosecutor can prepare his attack accordingly. Finally, because of the investigation to refute perjury and fraud, alibis will be given more weight and respect since the prosecution may be unable to overcome the validity of a proper assertion of a defendant's exculpating set of circumstances.

A JURY OF LESS THAN TWELVE IN A STATE CRIMINAL TRIAL.

The "due process" clause of the Fourteenth Amendment and the Sixth Amendment of the Federal Constitution do not entitle a State defendant to a jury of twelve persons.

The holding in *Duncan v. Louisiana*, 391 U.S. 145 (1968), did not indicate that a trial by a jury of *twelve* should be applied to the several states. The rational of *Duncan v. Louisiana*, supra, specifically indicated "When" a jury should be held. The number of jurors in criminal trials has always been a matter for state administration of criminal justice. Florida has always complied with the mandate that one should be tried by a jury of his peers and the verdict should be unanimous.

The requirement that one be tried by a jury of twelve persons has application only to the federal government. *Maxwell v. Dow*, 176 U.S. 581 (1900). The language of *Maxwell*, supra, indicates that the use of an eight man jury was acceptable. The State of Florida respectfully urges that the mandate of the due process clause of the Fourteenth Amendment is not violated whenever a defendant is tried by standards equally applied, and the jury serves to prevent the oppression that is often used by federal and state governments.

ARGUMENT I

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION ARE NOT VIOLATED BY A STATE REQUIREMENT THAT DEFENDANT DISCLOSE HIS ALIBI DEFENSES PRIOR TO TRIAL.

(A) FLORIDA'S PROCEDURE FOR REQUIRING ADVANCE NOTICE OF ALIBI IS FUNDAMENTALLY FAIR AND NOT VIOLATIVE OF THE FIFTH AMENDMENT.

The petitioner alleges that Florida's "Notice of Alibi" rule is unconstitutional in that it violates the Fifth Amendment and the Fourteenth Amendment of the Federal Constitution. Regardless of the allegations of the petitioner, Florida's Rule of Criminal Procedure 1.200 (Appendix A) is constitutional and not designed to compel a defendant to say anything. Rather it requires the disclosure if, and only if, the defendant plans to assert the defense of alibi at trial. The petitioner can not allege that being required to give notice of his defense incriminates him, for the Constitution does not shield a defendant from the consequences of a defense which he chooses to employ, nor does the Constitution grant him the right to so defend as to deprive the state a chance to check the veracity of his position. The constitutional challenge has long been rejected by both federal and state courts. *Rider v. Crouse*, 357 F.2d 317, 318 (10th Cir. 1966); *State v. Stump*, 254 Iowa 1181, 119 N.W.2d 210, 219 (Sup. Ct. 1963), certiorari denied, 375 U.S. 853, 11 L.Ed.2d 80 (1963); *People v. Rakiec*, 250 App. Div. 452, 23 N.Y.S.2d 607, 612, 613 (1940); *State v. Baldwin*, 47 N.J. 379, 221 A.2d 199, (1966), certiorari denied 385 U.S. 980, 87 S.Ct. 527 (1966); 1 Wharton, Criminal Evidence, (12th Ed. 1955) Sec. 23, p. 75; 2 Underhill, Criminal Evidence (5th Ed. 1956) Sec. 440, p. 1110; *People v. Schade*, 161 N.Y. Misc. 212, 292 N.Y.S. 612 (Cty. Ct. 1936); *Commonwealth v. Vecchiolli*, 208 Pa. Super. 483, 224 A.2d 96, 99 (Super. Ct. 1966); *State v. Dodd*, 101 Ariz. 234, 418 P.2d 571, 574

(Sup. Ct. 1966); *People v. Rakiec*, 260 App. Div. 452, 23 N.Y.S.2d 607, 612, 613 (3rd Dept. 1940); *State v. Thayer*, 124 Ohio St. 1, 176 N.E. 656 (Sup. Ct. 1931).

The petitioner would have this Court to believe that all evidence obtained from a criminal defendant is protected by the Fifth Amendment of the United States Constitution. Not true. Defendants have been subject to: Disclosure of records and documents kept by defendant in compliance with state or federal statutes, *Shapiro v. United States*, 335 U.S. 1 (1947); *Stillman v. United States*, 177 F.2d 607 (9th Cir., 1949); furnishing samples of handwriting, *Gilbert v. California*, 384 U.S. 985 (1966); Appearing in lineups, *United States v. Wade*, 388 U.S. 218 (1967); Blood samples and test; *Schmerber v. California*, 384 U.S. 757 (1966); Appearing in lineups. *Commonwealth v. Johnson*, 201 Pa.Super. 448, 193 A.2d 833 (1963); Posing in court for identification purposes, *People v. Clark*, 18 Cal.2d 449, 116 P.2d 56, 62 (1961); Medical examination of a prostitute for venereal disease pursuant to a state statute, *Ex parte Flowler*, 85 O.Cr. 64, 184P.2d814, (1947); Furnish names of witnesses who testify on an impotency defense, *Jones v. Superior Court of Nevada County*, 22 Cal. Rptr. 879, 372 P.2d 919 (1962); Laws requiring a driver to stop and identify himself after an accident, *People v. Rosenheiner*, 209 N.Y. 115, 102 N.E. 530 (1913); Disclosure of a letter addressed to wife sent from jail while awaiting trial for murder, *State v. Grove*, 65 Wash.2d 525, 398 P.2d 170 (1969).

In *Malloy v. Hogan*, 378 U.S. 1, 8 (1964), this court held "[t]he Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment, the right of a person to remain silent unless he *chooses to speak* in the unfettered exercise of his own will, and to

suffer no penalty . . . for such silence." The defendant who wishes to comply with the "Notice of Alibi" rule and subsequently not employ such defense at trial is protected by the provisions of the Fifth Amendment and the Fourteenth Amendment of the federal Constitution. The right of the defendant to remain silent or refuse to use his alibi witness, or to stand mute cannot be commented upon by the prosecution. In other words, if after compliance with the "Notice of Alibi" rule by a defendant, he chooses not to use his alibi, the "fundamental fairness" protects him from any inference which may be infered from his silence of that defense or his silence *in toto*.

Basic in the philosophy of American trials is the search for truth. Persuasive language is found in *State ex rel. Simos v. Burke*, 41 Wis.2d 129, 163 N.W.2d 177, 180, 181 (1968):

> "When a witness takes the stand, he swears or affirms that he will tell the truth, the whole truth and nothing but the truth. What is constitutionally protected is the right of a defendant to testify truthfully in his behalf. An alibi is not one of several alternative defenses that can be simultaneously asserted. If what the statute terms an alibi is found in truth and in fact, the defendant was not present to commit the offense charged. If this is the situation, the defendant suffers no prejudice by the requirement of advance notice of intention to establish such fact. If we are discussing the right of a defendant to defer until the moment of his testimony the election between alternative and inconsistent alibis, we have left the concept of the trial as a search for truth far behind."

The State of Florida takes the position that its "Notice of Alibi" Rule is a Rule of procedure and not one of substantive law. Consistently it has been held that each state may regulate the procedure of its courts in accordance with its own ideas of policy and *fairness*, unless, of course the procedure offends a principle of justice which is considered fundamental. See *Bute v. Illinois*, 333 U.S. 640 (1947).

Florida has operated under a system of fairness *both* to the public and the accused. Both the individual and society are entitled to due process and any deprivation of the right to fairness to public or individual weakens the administration of criminal justice. The constitutionality of the "Notice of Alibi" rule should not be disturbed so long as it is *uniformly* applied to all who may be in a situation wherein there is need for such.

Additionally the patent evidence of fairness is seen from Florida's Rule of Criminal Procedure 1.220 (Appendix B), which must be read in conjunction with Rule 1.200 in order that the picture of pre-trial discovery in Florida is not distorted.

Rule 1.220 provides for almost unlimited discovery by the defendant in order for him to better prepare his defense. A defendant nearing trial is allowed under the provisions of the Rule, to obtain the names and addresses of all the State's witnesses, as distinguished from merely those on whose evidence the information, or indictment is based. He additionally can depose the witnesses to his advantage or disadvantage as the case may be. The purpose of this rule is to afford the defendant relief from situations where witnesses refuse to "cooperate" by making pretrial

disclosures to the defense. Rule 1.200 compares favorably with Rule 16(c)[2] of Federal Rules of Criminal Procedure, (Appendix C) which provides to a limited degree discovery by the federal government. This Court has long subscribed to the philosophy of discovery in criminal cases for the defendant. "It was intended by the rules [the Rules of Criminal Procedure] to give some measure of discovery" *Bowman Dairy Co. v. United States*, 341 U.S. 214, 218 (1951). However, in July, 1966, under its rule making power,[3] this Court placed its stamp of approval on Rule 16(c) which provides for some discovery by the federal government in criminal trials.

The adoption of Rule 1.220, and other related pretrial discovery measures, evinces Florida's continued concern for fair trials within her boundaries. However, the presence of Rule 1.200 would indicate that the public expects to receive from the defendant the same basic consideration in the search for truth that this Court has previously held the prosecution must also give. See, e.g. *Brady v. Maryland*, 373 U.S. 83 (1963).

When viewed in light of fundamental fairness to both the defendant and the State, the "Notice of Alibi" statute affords no greater advantage to the State than it does to the defendant. In reality, it balances the scales in the search for truth.

Under the provisions of Florida's Rule 1.200, the State is *required* to furnish the defendant with the name of witnesses it expects to use to rebut the testimony of the alibi witness. The specific language of the Rule is as follows:

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[2]Appendix C.

[3]18 U.S.C., Sec. 3771 (1964 ed.)

> ". . . Not less than five days after receipt of the defendant's witness list, or such other times as the court may direct, the prosecuting attorney shall file and serve upon the defendant the names and addresses (as particularly as known the prosecuting attorney) of the witnesses the State proposes to offer in rebuttal to discredit the defendant alibi at the trial of the cause. Both the defendant and the prosecuting attorney shall have a continuing duty to promptly disclose the names and addresses of the additional witnesses which come to the attention of either party subsequent to the filing their respective witness list as provided in this rule . . ."

The foregoing passage shows that the State does not intend to have the defendant placed in a disadvantageous position of wondering who will testify against him. It affords the defendant the opportunity to interrogate, investigate and more effective present his defense. The same duty that is placed upon the defendant is placed upon the State, thus making each *pari causa.*

Furthermore, the "penalty" provisions for non-compliance with the alibi rule are also reasonable. Under the Florida rule, if the defendant fails to give the required notice, the judge *may* (he is not required to) exclude the alibi witnesses (although he may *not* exclude the defendant's own personal alibi testimony).

Thus, with regard to the judge's power, "he may waive any requirements [of the rule] for good cause shown." "Author's Comment", Fla. R. Crim. P. 1.200, 33 Fla. Stat. Anno. This means that even if there is non-

compliance with this notice rule (or any Florida discovery rule) and the trial judge excludes the witnesses' testimony, the defendant still has the remedy on appeal of demonstrating the exclusion was an abuse of discretion under the facts of the case. *Cacciatore v. State*, 226 So.2d 137 (3rd D.C.A. Fla. 1969). In this regard the Florida courts have shown no hesitation in reversing an exclusion where the non-compliance was due to counsel's inadvertance or mistake. See, e.q., *Wilson v. State*, 220 So. 2d 426 (3rd D.C.A. Fla. 1969).

The alibi Rule does not infringe on the privilege against self-incrimination. Rather, it set up a wholly reasonable rule of pleading which in no way compels a defendant to give any evidence other than that which he will voluntarily and without compulsion give at trial, thereby waiving any Fifth Amendment privilege with respect thereto. It is urged that no constitutional issue turns on the timing of disclosure.

Mr. Justice Traynor, Chief Judge of the California Supreme Court had the following persuasive words to say:

> "Neither the privilege against self-incrimination nor the due process requirements of a fair trial fix the time when the prosecution has presented its evidence at the trial as the only procedural hour at which the defendant can be required to make his decision whether to remain silent or to present his defense. Surely he can make that decision before the trial if he is given discovery of the prosecutor's case before trial." Roger J. Traynor, Ground Lost and Found in Criminal Discovery, 39 N.Y. U.L. Rev. 228, 248-49 (1966).

The defendant is the sole judge of what he is going to do and he is not compelled in any sense to be a witness against himself but only to give certain information to the prosecution if he intends to submit an alibi. Moreover, the information sought by the prosecution is not as to matters which the defendant says may *incriminate* him, but as to the matters which the defendant says may *exonerate* him. The rebuttal to the claim of self-incrimination can be answered with a long established principle of law: the prosecution must establish defendant's presence at the scene of the crime and the defendant need not establish that he was elsewhere. Alibi is not an affirmative defense as to which the defendant has assumed the burden of proof. *Commonwealth v. Choate*, 105 Mass. 451 (1870).

In a majority of jurisdictions the correct rule is adopted;—that it is a necessary part of the governments case to show, when disputed, that the defendant was present at the scene of the alleged act at the time when he was claimed to have committed an act against the peace and dignity of the state. Subsequently, it has been held that while the burden is on the defendant to introduce evidence sufficient to raise reasonable doubt, the burden of proof still continues to be on the prosecution as to the necessary element of its case. *Glover v. United States*, 147 Fed. 426 (8th Cir. 1906)

Under the provisions of the Fourteenth Amendment of the federal Constitution, the due process clause does not require that proceedings in state courts shall be according to any particular mode, and the requirement of "due process is complied with, if timely notice is given defendant, and he has opportunity to defend, and trial

is thereafter had in accordance with regular course of procedure under the state practice. *Fryberger v. Parker*, 28 F.2d 493, 496 (C.C.A. 8th Minn. 1925).

It is noteworthy to mention that pre-trial discovery in favor of the defendant is not required by due process of law. (See 18 U.S.C. Sec. 3500); *Palermo v. United States*, 360 U.S. 343, 349 (1959); *People v. Riser*, 47 Cal. 2d 66, 305 P.2d 1 (1956); *Campbell v. United States*, 365 U.S. 85 (1961). Therefore when Florida courts allow discovery by the defendant are not acting under constitutional compulsion, but to promote the orderly ascertainment of the truth.

Florida maintains that this procedure should not be a one-way street. Mr. Justice Cardoza once opined; "But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.", *Snyder v. Massachusetts*, 291 U.S. 97 (1934).

(B) THE PURPOSE OF THE RULE IS THE FURTHERANCE OF A LEGITIMATE STATE INTEREST—THE PREVENTION OF PERJURY.

Several reasons exist for the rule to the advantage of both the defendant and the prosecution in this very neglected area of criminal procedure in the law. It was designed to prevent the sudden "popping-up" of witnesses to prove that the accused was not at the scene of the crime at the time of its commission and thus creating a "reasonable doubt" about the testimony of state's witnesses.

The bringing into the courtroom of "phoney alibi" witnesses at the eleventh hour and at a time which, in practice affords the prosecutor no opportunity to check either the credibility of the witnesses or the accuracy of their statements is avoided by the "Notice of Alibi" Rule. Surely it cannot be argued that there is a "right" to use perjured testimony in a criminal trial.

The rule is further designed to avoid surprise at trial by the sudden introduction of a factual claim which cannot be investigated unless the trial is recessed to that end. Modern trend in discovery is to broaden access to material facts and reduce belated surprise, *Rider v. Crouse*, 357 F.2d 317 (10th Cir. 1966); *State v. Martin*, 410 P.2d 132 (1966) 2 Ariz.App. 510; *State v. Stump*, 119 N.W.2d 210 (1963) 254 Iowa 1181.

Since alibis can be readily fabricated, the "Notice of Alibi" Rule is intended to erect safeguards against its wrongful use. *State v. Nooks et al.*, 174 N.E. 743 (1930), 123 Ohio St., 190.

The pivotal issue is one of basic public policy as to how completely pre-trial discovery and inspection in criminal cases should be analogized to that in non-criminal cases.

The Supreme Court of Wisconsin had the following to say about notice in an alibi case before it:

> "If a criminal trial is viewed as a draw poker game with all cards to be held close to the chest until played, this can be seen as requiring a tipping of one's hand in advance. However, if a criminal trial is viewed, as a search for the

> truth, with every protection provided for investigation and preparation and to insure against the conviction of the innocent, notice requirements forward the purpose of the process. *State ex rel. Simos v. Burke*, 41 Wis.2d 129, 131; 163 N.W.2d 177, 180 (1968).

Criminal trials since their very beginning have been searches for the truth of a particular situation. Petitioner would have this Court strike down the notice of alibi rule because he argues it "abridges" or creates a "chilling effect" upon his Fifth Amendment rights. Respondent submits that the only effect of ruling in petitioner's favor would be to create a "chilling effect" on the veracity of alibi witnesses' testimony.

ARGUMENT II

(A) THE PURPOSE OF JURY TRIAL IN THE ANGLO-AMERICAN SYSTEM.

In *Duncan v. Louisiana*, 391 U.S. 145 (1968), this Court discussed the historical purpose of a jury trial.

> "The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the complaint, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more

> tutored but perhaps less sympathetic reaction of a single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in determination of guilt or innocence." *Duncan*, supra at 156.

The jury, as defined by the foregoing telling passage, is a buffer between the defendant and oppression by the State and its officers.

(B) THE FEDERAL STANDARD REQUIRES ADHERENCE ONLY TO THE ESSENTIAL ELEMENTS OF THE COMMON LAW JURY.

The general, overriding federal rule is that only the *essentials* of a jury trial, as it was at the time the Constitution was adopted, must be maintained. *Galloway v. United States*, 319 U.S. 372 (1943).

The older decisions of this Court have maintained the following as essentials of jury trials:

1. In all serious offenses a defendant shall have the right to a jury trial. The line of demarcation between serious and petty offenses is laid out in *Duncan*, supra; and

further this Court there stated the severity of the punishment authorized for the offense may change the character of the petty offense to a serious one, thus, making the trial by jury, a must.

2. It has been the standard under federal law, since the adoption of the common law, that a verdict in a criminal trial must be unanimous. *Patton v. United States*, 281 U.S. 276 (1930).

3. Additionally, the requirement of a *twelve* man jury was long ago established. *Thompson v. Utah*, 170 U.S. 343 (1898).

(C) WHAT PARTS OF THE FEDERAL STANDARD ARE REALLY ESSENTIAL?

1. *TRIAL BY JURY IS ESSENTIAL IN SERIOUS OFFENSES TO FULFILL THE JURY'S PURPOSE.*

This Court correctly interpreted the concept of trial by jury in serious offenses to be essential to the common law concept of the right. It is repulsive to the respondent that any man would be deprived of a jury trial when charged with a serious offense, carrying the possibility of over six months in prison. The possible oppression by government, in these cases, can only be checked through the deliberations of the defendant's peer group. When life and liberty are the freedoms to be lost, the jury of one's peers fight the battle of containing government within the bounds established by the Constitution. Moreover, respondent agrees that trial by jury should be furnished when an offense has been "classified" as petty, but the authorized punishment may convert it into what is a serious offense, thus vesting the defendant with trial by jury.

2. *UNANIMOUS VERDICTS ARE ALSO ESSENTIAL TO FULFILLING THE JURY'S PURPOSE.*

The federal standard requires that the verdict be a unanimous one. Florida agrees, from a very practical view, that this rule of the common law should be maintained. The right to life and liberty are so precious that it should not be deprived unless it is with the consent of *all.* Florida follows the common law and the federal law in this regard, since it considers unanimity vitally essential to the jury system. Additionally, the unanimous jury verdict is etched in our political and civic institutions.

A person on trial for life should not be subject to the decision of ten out of twelve people, nor should he be subject to five out of six; rather, the verdict of this precious gift of life or liberty must not be taken away, unless all agree. To allow a conviction to rest upon less than unanimity is to abrogate the rule that guilt must be proven beyond and to the exclusion of every reasonable doubt.

3. *THE EXISTENCE OF TWELVE JURORS IS NOT ESSENTIAL TO FULFILLING THE JURY'S PURPOSE.*

When the function of the jury is reviewed, there is no essential reason for requiring any particular number of jurors. That function has as its purpose, the prohibition of oppression by the government and the checking of power unjustly used by the prosecution or the judge.

The old standard of twelve used by the federal government is but a carry over from the common law in existence at the time the Constitution was adopted; nothing more.

Mr. Justice Harlan expressed in his dissenting opinion in *Duncan v. Louisiana*, supra, at 182, a view the respondent supports:

> "I should think it equally obvious that the rule, imposed long ago in federal courts, that, 'jury' means 'jury of exactly twelve' is not fundamental to anything: there is no significance except to mystics in the number 12."

The number twelve has come to us from a source which is of doubtful validity, in light of the anti-establishment clause of the First Amendment. "All the early cases speak of twelve as composing the jury because Lord Coke said, 'the law delighteth in the number twelve and it is much respected in the Holy Writ, as twelve apostles, twelve stones, twelve tribes, etc.' " *In Re Report Grand Jury*, 11 So.2d 316, 317 (Fla. 1943). The use of the number twelve in the Holy Writ is frequent indeed.

> "He called unto him his twelve disciples. He had many more. . . . Twelve was the number of the Jewish Church, the Church of the twelve patriarchs: it is the number of the Christian Church, the Church of the twelve apostles. . . . [I]n the heavenly Jerusalem, the city of the living God, which hath twelve gates, twelve angel-guardians, twelve foundations, the length and breadth and height of which are each twelve thousand furlongs." H. Spence, 33 THE PULPIT COMMENTARY, THE GOSPEL ACCORDING TO ST. MATTHEW, 418 (1943).

While the number twelve has been around for centuries, it is not essential to the function of the jury, given the latter's purpose in our judicial system.[4] It is the respondent's position that six persons can provide protection from oppression as well as twelve persons.[5]

Respondent here only argues what should be the constitutionally required *minimum* number of jurors in order to fulfill the essentials of the jury right at common law. The rationality of providing *more* than six jurors (which respondent maintains meets the constitutional minimum) in certain cases has not been raised herein.

In fact, the petitioner has advanced no rational reason nor advanced any statistical support for the proposition that it is essential to have twelve jurors in order to fulfill the jury's purpose. Respondent submits this dearth of reason or authority stems from the fact that experience demonstrates the impotency of petitioner's position.

For example, in the Worcester, Massachusetts District Court the legislature authorized six man juries on an experimental basis in civil cases. A study of this experiment concluded that the six man juries resulted in "prompt trials and lower costs" with verdicts "*no different than those returned by twelve member juries.*" "Six-Member Juries Tried in Massachusetts District Court", 42 *J.Am.*

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[4]The practice of using six member juries in felony cases is also of long standing in Florida. They were first provided for by constitutional amendment in 1875. *Gibson v. State*, 16 Fla. 291 (1877).

[5]Respondent here notes that Fla. Stat. 913.10 does provide for twelve member juries in capital cases; however, the petitioner has not raised an "equal protection" argument on this ground at any stage of the case sub judice.

Jud. Soc'y., 136 (1958). The same conclusions were reached in a New Jersey six member jury experiment. "New Jersey Experiments with Six-Men Jury", 9 *Bull. of the Section of Jud. Ad. of A.B.A.*, (May 1966).

The text writers and jurists agree that there is nothing significant about the number twelve, except it was the number used in trials when we adopted the Constitution; it follows that to have twelve persons is *not* an *essential* part of the jury system as it existed at common law.

To hold there is a state violation of the due process clause simply because a defendant is tried in a state court by less than twelve men, rather than an even number of twelve, would seem to be contrary to the thoughts and philosophy of a great jurist of the 19th Century:

> "It is revolting to have no better reason for a rule of law than it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid have vanished long since, and the rule simply persists from blind imitation of the past." MR. JUSTICE HOMES, "THE PATH OF THE LAW," 10 *HARV. L. REV.*, 457, 459 (1897)

(D) THE TWELVE MEMBER REQUIREMENT SHOULD NEITHER BE INCORPORATED INTO DUE PROCESS NOR REMAIN AN ESSENTIAL ELEMENT OF THE FEDERAL STANDARD.

Respondent submits that, based upon the foregoing analysis, the twelve member requirement should be recognized for what it is—the vestigial remains of early common law mystical religious thought, and it thereby should not be incorporated upon the States nor retained as an essential element of the federal constitutional standard.

Respondent urges this Court to re-affirm the requirement of a jury trial in all serious offenses as a requiste of due process. Respondent further urges that this Court re-affirm and incorporate the requirement of unanimous verdicts in all criminal cases as an essential element of due process and the federal standard, since a conviction where 20% or 25% of the jurors believe the defendant's innocence is contrary to the burden of proving guilt beyond a reasonable doubt.

Respondent simply submits that the "numbers game", i.e., the twelve member requirement, is not essential to maintaining the features of the common law jury right and thus six member juries should be constitutionally permissable in both State and federal courts. Petitioner has advanced no reason why a six member jury in any way diffuses the jury's effectiveness in fulfilling its fundamental purpose as announced by the Court in *Duncan*.

On the contrary, experience with six member juries demonstrates they achieve the same result as their twelve member counterparts with a considerable saving in money, and more importantly, time. This "time saving" is particularly crucial in meeting the needs of our modern criminal justice system with its rising case-load and with the importance now being placed upon the defendant's fundamental right to a speedy trial. See *Klopfer v. North Carolina*, 386 U.S. 213 (1967).

Thus, the respondent asks this Court to here (as it has so often done in recent years) and now re-examine its decades-old holding that the twelve member requirement is essential to retaining the fundamentals of the common law jury right. See *Thompson v. Utah*, 170 U.S. 343 (1898).

Reason and statistical experience demonstrate the efficiency of six man juries. Only the echos of the archaic past and the unsupported assertions of the petitioner call for the retention of twelve member juries. Respondent simply asks this Court to remain true to the admonition of Mr. Justice Holmes and to neither incorporate the twelve member requirement on the States nor retain it as an essential of the federal Sixth Amendment right.

CONCLUSION

The respondent respectfully submits that the petitioner has failed to demonstrate that any of the federal constitutional rights have been violated. In the absence of a clear showing that the current state of the law in Florida is violative of the federal Constitution, this Court is under no legal or moral obligation to reverse the decision before this Court.

The respondent has, without question, shown that the alleged constitutional abridgements are but figments of the legal imagination of the petitioner.

The State of Florida would respectfully urge that the decision of the District Court of Appeal be affirmed.

Respectfully submitted,

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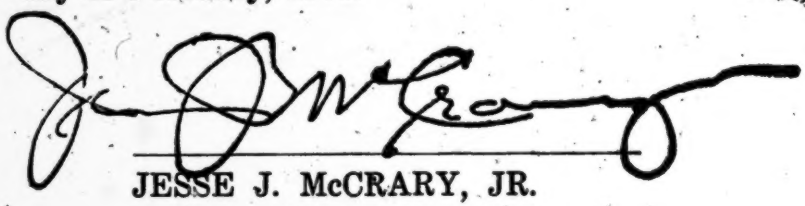
AFFIDAVIT OF SERVICE

I, JESSE J. McCRARY, JR., Assistant Attorney General, State of Florida, first being duly sworn according to law, to depose and say:

I HEREBY CERTIFY that three copies of the Brief of the Respondent to the Supreme Court of the United States was served upon HONORABLE RICHARD KANNER, 1150 N.W. 14th Street, Miami, Florida 33137, by mailing the copies of same to him by United States Mail, First Class postage prepaid, pursuant to Rule 33 of this Court, this 6th day of February, 1970.



JESSE J. McCRARY, JR.
Assistant Attorney General

SWORN TO AND SUBSCRIBED before me at Miami, Dade County, Florida, this 6 day of February, 1970.

NOTARY PUBLIC
State of Florida
My Commission Expires:

APPENDIX A

Florida's Rule of Criminal Procedure 1.200

Upon the written demand of the prosecuting attorney, specifying as particularly as is known to such prosecuting attorney, the place, date and time of the commission of the crime charged, a defendant in a criminal case who intends to offer evidence of an alibi in his defense shall, not less than ten days before trial or such other time as the court may direct, file and serve upon such prosecuting attorney a notice in writing of his intention to claim such alibi, which notice shall contain specific information as to the place at which the defendant claims to have been at the time of the alleged offense and, as particularly as is known to defendant or his attorney, the names and addresses of the witnesses by whom he proposes to establish such alibi. Not less than five days after receipt of defendant's witness list, or such other times as the court may direct, the prosecuting attorney shall file and serve upon the defendant the names and addresses (as particularly as are known to the prosecuting attorney) of the witnesses the State propoes to offer in rebuttal to discredit the defendant's alibi at the trial of the cause. Both the defendant and the prosecuting attorney shall be under a continuing duty to promptly disclose the names and addresses of additional witnesses which come to the attention of either party subsequent to filing their respective witness lists as provided in this rule. If a defendant fails to file and serve a copy of such notice as herein required, the court may exclude evidence offered by such defendant for the purpose of proving an alibi, except the testimony of the defendant himself. If such notice is given

by a defendant, the court may exclude the testimony of any witness offered by the defendant for the purpose of proving an alibi if the name and address of such witness as particularly as is known to defendant or his attorney is not stated in such notice. If the prosecuting attorney fails to file and serve a copy on the defendant of a list of witnesses as herein provided, the court may exclude evidence offered by the state in rebuttal to the defendant's alibi evidence. If such notice is given by the prosecuting attorney, the court may exclude the testimony of any witness offered by the prosecuting attorney for the purpose of rebutting the defense of alibi if the name and address of such witness as particularly as is known to the prosecuting attorney is not stated in such notice. For good cause shown the court may waive the requirements of this rule.

APPENDIX B

Florida's Rule of Criminal Procedure 1.220

VI. DISCOVERY

Rule 1.220 Discovery

(a) Production of Statement or Confessions, or Results or Reports of Physical or Mental Examinations, and of Defendant's Recorded Testimony Before Grand Jury. When a person is charged with an offense, upon motion of such person, at any time after the filing of the indictment, information, or affidavit upon which the defendant is to be tried, the court shall order the prosecuting attorney:

(1) To permit the defendant to inspect and copy or photograph the defendant's written or recorded statements or confessions, if any, whether signed or unsigned.

(2) To permit the defendant to inspect and copy or photograph results and reports of physical or mental examinations, and of scientific tests, or experiments made in connection with the particular case, or copies thereof, which are known by the prosecutor to be within the possession, custody, or control, of the state; and,

(3) To permit the defendant to inspect and copy or photograph the recorded testimony of the defendant before a grand jury, if any.

The order shall specify the time, place and manner of making the inspections and of making copies or photographs and may prescribe such terms and conditions as are just.

(b) Production of Other Documents and Things for Inspection, Copying or Photographing. When a crime is alleged to have been committed and the evidence of the state shall relate to ballistics, firearms identification, fingerprints, blood, semen, or other stains or documents, papers, books, accounts, letters, photographs, objects, or other tangible things of whatsoever kind or nature, the court shall order the state to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated papers, books, accounts, letters, photographs, objects, or other tangible things. At any examination to be conducted by representatives of the state as to ballistics, firearms identification, fingerprints, blood, semen, and other stains, the defendant, upon motion and notice, shall be permitted by order of court, to be present, or have present an expert of his own selection, or both, during the course of such examination. The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs, and may prescribe such terms and conditions as are just.

(c) Reciprocal Discovery. If the court grants relief sought by the defendant under (a) (2), or (b) of this rule, it shall condition its order by requiring that the defendant permit the state to inspect, copy or photograph scientific or medical reports, books, papers, documents, or tangible objects which the defendant intends to produce at the trial and which are within his possession, custody, or control.

(d) Disclosure of Witnesses Supplying Basis for Charge. It shall not be necessary to endorse on any indictment or information, the names and addresses of the wit-

nesses on whose evidence the same is based, but upon motion of the defendant the court shall order the prosecuting attorney to furnish the names and addresses of such witnesses.

(e) **Exchange of Witness Lists.** In addition to, or instead of, the practice described in Rule 1.220(d) when a person is charged with an offense he may at any time after the filing of the indictment or information against him, or the affidavit upon which the defendant is to be tried, file in the cause an offer in writing (a copy of which offer shall be furnished to the prosecuting attorney) to furnish to the prosecuting attorney a list of all witnesses with their addresses and whereabouts if known whom the defendant expects to call as defense witnesses at the trial, whereupon, within five days after receipt of same by the prosecuting attorney, or within six days after the mailing of same to the prosecuting attorney, whichever shall be earlier, the prosecuting attorney shall file with the clerk and furnish to the person charged, a list of all witnesses known to the prosecuting attorney to have information which may be relevant to the offense charged, and to any defense of the person charged with respect thereto; and, within five days after the prosecuting attorney files with the clerk and furnishes such list of witnesses to the defendant, or within six days after the mailing of same to the defendant, whichever shall be earlier, the defendant shall file with the clerk and furnish to the prosecuting attorney a list of all witnesses whom the defendant expects to call as defense witnesses at the trial.

The prosecuting attorney may, prior to filing his list of witnesses, move the court for a protective order as provided in subsection (h) of this rule. The filing of a

motion for a protective order will automatically stay the times provided for in this subsection. If a protective order is granted the defendant may, within two days thereafter, or at any time before the prosecuting attorney files a list as required herein, withdraw his offer and not be required to furnish his list of witnesses.

(f) **Discovery Depositions.** When a person is charged with an offense, upon motion of such person, at any time after the filing of the indictment, information, or affidavit upon which the defendant is to be tried and after notice to the prosecuting attorney, the court shall order the taking of the deposition of any person other than a confidential informer who will not be a witness at the trial, who may have information relevant to the offense charged and the defense of the person charged with respect thereto, on showing that the testimony of the witness may be material or relevant on the trial, or of assistance in the preparation of the defense of the person charged, and on showing that the witness will not cooperate in giving a voluntary, signed, written statement to the person charged or his attorney. The person charged shall give to the prosecuting attorney written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of the prosecuting attorney, the court ordering the deposition may, for good cause shown, extend or shorten the time and may change the place of taking. A deposition under this section shall be taken in the manner provided in the Florida Rules of Civil Procedure, and the scope of examination, on such deposition, and as to the written statement above shall be the same as that provided in the Florida Rules of Civil Procedure. Any deposition taken pursuant hereto may be used by any party for

the purpose of contradicting or impeaching the testimony of the deponent as a witness. An order to take depositions authorizes the issuance of subpoenas by the clerk of the court for the persons named or described therein. A resident of the state may be required to attend an examination only in the county wherein he resides, or is employed, or regularly transacts his business, in person. A person who refuses to obey a subpoena served upon him may be adjudged in contempt of the court from which the subpoena issued.

(g) Continuing Duty to Disclose; Failure to Comply. If, subsequent to compliance with an offer or order for discovery under these rules, and prior to or during trial, a party discovers additional material which he would have been under a duty to disclose or produce at the time of such previous compliance, if it was then known to the party he shall promptly notify the other party or his attorney of the existence of the additional material in the same manner as required under these rules for initial discovery. If, at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from calling a witness not disclosed, or introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances.

(h) Protective Orders. Upon a sufficient showing the court may, at any time, grant a protective order whereby the discovery contemplated by paragraphs (d), (e) and (f) hereof, is denied, restricted, or deferred, or

make such other order as is appropriate and may alter the time of compliance provided for herein. Upon motion by the prosecuting attorney the court may permit the state to make such showing, in whole or in part, in the form of a written statement to be inspected by the court alone. If the court enters an order granting relief following a showing to the court alone, the entire text of the state's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant.

(i) **Costs of Indigents.** After a defendant is adjudged insolvent, the reasonable costs incurred in the operation of these rules shall be taxed as costs against the county.

(j) **Application of Rule to County Judge's and Justice of the Peace Courts Having Irregular or No Prosecutors.** In a county judge's court or a court of a justice of the peace in which there is no prosecutor who can be required to meet the obligations of the state as provided for in this rule, the judge or justice of the peace shall meet such obligations in so far as it is reasonable to do so, including the issuance of appropriate orders to the affiant responsible for making the affidavit upon which the defendant is to be tried.

APPENDIX C

Federal Rules of Criminal Procedure, Rule 16.

Rule 16 Discovery and Inspection

(a) Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, (2) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and (3) recorded testimony of the defendant before a grand jury.

(b) Other Books, Papers, Documents, Tangible Objects or Places. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivision (a) (2), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in

connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. § 3500.

(c) Discovery by the Government. If the court grants relief sought by the defendant under subdivision (a) (2) or subdivision (b) of this rule, it may, upon motion of the government, condition its order by requiring that the defendant permit the government to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within his possession, custody or control, upon a showing of materiality to the preparation of the government's case and that the request is reasonable. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.

(d) Time, Place and Manner of Discovery and Inspection. An order of the court granting relief under this rule shall specify the time, place and manner of making the discovery and inspection permitted and may prescribe such terms and conditions as are just.

(e) Protective Orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such

other order as is appropriate. Upon motion by the government the court may permit the government to make such showing, in whole or in part, in the form of a written statement to be inspected by the court *in camera*. If the court enters an order granting relief following a showing *in camera*, the entire text of the government's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant.

(f) Time of Motions. A motion under this rule may be made only within 10 days after arraignment or at such reasonable later time as the court may permit. The motion shall include all relief sought under this rule. A subsequent motion may be made only upon a showing of cause why such motion would be in the interest of justice.

(g) Continuing Duty to Disclose; Failure to Comply. If, subsequent to compliance with an order issued pursuant to this rule, and prior to or during trial, a party discovers additional material previously requested or ordered which is subject to discovery or inspection under the rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional material. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances.

As amended Feb. 28, 1966, eff. July 1, 1966.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 927

JOHNNY WILLIAMS,
Petitioner,

v.

FLORIDA.

ON WRIT OF CERTIORARI TO THE
DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

REPLY BRIEF FOR PETITIONER

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I.

The Notice of Alibi Rule Is Unconstitutional

Respondent's constitutional defense that the notice of alibi rule is merely procedural is completely refuted in *Washington v. Texas*, 388 U.S. 14, 22.

> In light of the common-law history * * * that the Sixth Amendment was designed in part to make the testimony of a defendant's witnesses admissible on his behalf in court, it could hardly be argued that a State would not violate the clause if it made all defense testimony inadmissible as a matter of procedural law. It is difficult to see how the Constitution is any less violated by arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of *a priori* categories that presume them unworthy of belief.

The Oklahoma statute[1] constitutionally satisfies the purposes respondent advances for the rule without inconvenience to the State.

II.

Six Men Cannot Constitute a Jury

Respondent's proposal that the Court apply standards varying from federal values in interpreting Bill of Rights' guarantees has not heretofore gained acceptance by a majority of this Court. See *Kerr v. California*, 374 U.S. 23 at 30, *Aguilar v. Texas*, 378 U.S. 108 at 110, *Pointer v. Texas*, 380 U.S. 400 at 407, *Malloy v. Hogan*, 378 U.S. 1 at 7.

> It is not a license to the judiciary to administer a watered-down, subjective version of the individual guarantees of the Bill of Rights when state cases come before us. *Eaton v. Price*, 364 U.S. 263, 275.

Respectfully submitted,

RICHARD KANNER
Attorney for Petitioner

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[1] Title 22 § 585: "Whenever testimony to establish an alibi on behalf of the defendant shall be offered * * * and notice of the intention * * * shall not have been served * * *, the court may grant a postponement for such time as it may deem necessary * * *.